IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

C.W.P. No.6630 of 2000

Date of decision: 14.03. 2007

Jindal Strips Limited and another.

-----Peititioners.

Vs.

State of Haryana and others.

-----Respondents.

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR JUSTICE H.S. BHALLA

Present: Mr. A.K. Ganguly, Sr, Advocate with
Mr. Puneet Bali, Advocate,
Mr. Rajiv Agnihotri, Advocate,
Mr. Nikhil Nayyar, Advocate,
Mr. Rajan Jain, Advocate,
Mr. Amit Prashar, Advocate,
Mr. Karanjit Singh, Advocate,
Mr. Ranjit Saini, Advocate and
Mr. K.K. Mittal, Advocate
for the petitioners.

Mr. Rakesh Dwivedi, Senior Advocate and
Mr. Uday Lalit, Senior Advocate with
Mr. Jaswant Singh, Additional Advocate General of Haryana,
Ms. P. Keswani, Advocate and
Mr. Kavin Gulati, Advocate.
for the respondent.

ADARSH KUMAR GOEL,J

1. This matter has been placed for hearing before us in pursuance of order of Hon'ble the Supreme Court dated 14.7.2006 in CA No.3453 of 2002 and connected matters reported

in **Jindal Stainless Limited (3) and another v. State of Haryana and others**, (2006) 7 SCC 271 (hereinafter referred to as **'Jindal Stainless Limited (3)'**).

2. Appeal before the Hon'ble Supreme Court arose from the judgment of this Court dated 21.12.2001 reported in **Jindal Strips Limited and another v. State of Haryana and others**, (2003) 129 STC 534.

3. When the appeal against judgment of this Court was placed for hearing before a Bench of the Hon'ble Supreme Court, correctness of the view taken by the Hon'ble Supreme Court in earlier judgment in **Bhagatram Rajeev Kumar v. CST**, 1995 Supp (1) SC 673, which was followed in **State of Bihar v. Bihar Chamber of Commerce**, (1996) 9 SCC 136, was doubted and the matter was referred to a Constitution Bench to decide with certitude the parameters of the judicially evolved concept of compensatory tax vis-a-vis Article 301 of the Constitution. The said order dated 26.9.2003 is reported in **Jindal Stripe Limited and another v. State of Haryana and others**, (2003) 8 SCC 60, (hereafter referred to as **'Jindal Stripe Limited (I)**'. The Constitution Bench decided the issue referred to it vide its judgment dated 13.04.2006 reported in **Jindal Stainless Limited**

(2) and another v. State of Haryana and others, (2006) 7 SCC 241 (hereafter referred to as '**Jindal Stainless Limited (2)'**).

4. The issue arose in the context of challenge to the constitutional validity of the Haryana Local Area Development Tax Act, 2000 (hereinafter referred to as, "the Act") on the anvil of Article 301 of the Constitution. Contention raised on behalf of the petitioners was that the impugned levy was hit by Article 301 as the same was not compensatory or regulatory but imposed for augmenting general revenue. On the other hand, the stand taken by the State was that the impugned tax was compensatory in character. It was also submitted that the tax did not directly or immediately affected the movement of trade. Facilities provided in the local area ultimately led to better trade and commerce and benefited the traders.

This Court rejected the contentions raised on behalf of the petitioners. Reliance was placed, inter-alia, on judgments of the Hon'ble Supreme Court in **Bhagatram** and **Bihar Chamber of Commerce's** cases (supra). It was concluded that the impugned tax was compensatory tax and did not come within the purview of "restriction" contemplated in Article 301 of the Constitution. This Court also took into account provisions incorporated in the Constitution of India by 73rd and 74th

Constitutional Amendment Acts by way of Part IX and IX-A, providing for conferring powers on panchayats and local bodies to enable them to function as institutions of self government in respect of functions listed in Eleventh and Twelfth Schedules to the Constitution. It was observed that provisions relating to roads, bridges, streets, markets, water supply and sanitation were meant to facilitate free flow of trade and since Section 22 of the Act provided for distribution of tax collected among local bodies, the same was compensatory.

5. This Court observed:-

> "44. We have given serious thought to the respective arguments. Article 245(1) declares that subject to the provisions of the Constitution, the Parliament may make laws for the whole or any part of the territory of India and the Legislature of a State may make laws for the whole or any part of the State. Article 246 deals with subject-matter of laws made by the Parliament and the Legislatures of the States. Clause (1) of Article 246 declares that notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List-I of the Seventh Schedule. Clause (2) lays down that notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III of the Seventh Schedule. Clause (3) declares that subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List-II in the Seventh Schedule. It is, thus, evident that the

Legislature of a State has the exclusive power to make laws for the whole or any part of the territory of that State in respect of the matters enumerated in List-II of the Seventh Schedule, but this power is subject to the other provisions of the Constitution. This means that the power of the Legislature to make laws is also subject to the provisions of Part-XIII of the Constitution. Article 301, which is first in the family of Articles dealing with trade, commerce and inter-course within the territory of India, lays down that subject to other provisions of this part (Part-XIII), trade, commerce and inter-course throughout the territory of India shall be free. Article 302 declares that the Parliament may by law impose such restrictions on the freedom of trade, commerce or inter-course between one State and another or within any part of India as may be required in public interest. Article 303(1) contains a non-obstante clause. It lays down that notwithstanding anything in Article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and the another, by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule. Clause (2) of Article 303 further lays down that nothing in clause (1) would prevent the Parliament from making any law giving or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. Article 304 also contains a non- obstante clause. It lays down that notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law-- (a) impose on goods imported from other States or the Union Territories any tax to which similar goods manufactured or produced in that State

are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and (b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that Sate as may be required in the public interest.

45. In Atiabari Tea Co. Ltd. v. State of Assam (supra), a Constitution Bench of the Supreme Court considered the validity of the Assam Taxation (on goods carried by Roads or Inland Waterways) Act, 1954. Their Lordships of the Supreme Court referred to the provisions of the Government of India Act, 1935 and the Constitution and by a majority judgment struck down the impugned legislation on the ground that it violated Article 301 of the Constitution. In all, three views were expressed by the Judges constituting the Bench. Chief Justice-- B.P.Sinha expressed the view that taxation simpliciter was not within the terms of Article 301, a tax on movement of goods or passengers and it did not necessarily connote impediment or restraint in the matter of trade and commerce. He drew a distinction between taxation as such for the purpose of revenue on the one hand and taxation for the purpose of making discrimination or giving preference on the other hand and recorded the following conclusion:

" Thus, on fair construction of the provisions of Part XIII, the following propositions emerge : (1) trade, commerce, & inter-course throughout the territory of India are not absolutely free, but are subject to certain powers of legislation by Parliament or the Legislature of a State; (2) the freedom declared by Art.301 does not mean freedom from taxation simpliciter, but does mean freedom from taxation which has the effect of directly impeding the freedom flow of trade, commerce and intercourse; (3) the free envisaged in Art. 301 is subject to non-discriminatory restrictions imposed by Parliament in public interest (Art. 302); (4) even discriminatory or preferential legislation may be made by

Parliament for the purpose of dealing with an emergency like a scarcity of goods in any part of India (Art. 303(2)); (5) reasonable restrictions may be imposed by the Legislature of a State in the public interest (Art. 304(b)); (6) non-discriminatory taxes may be imposed by the Legislature of a State on goods imported from another State or other States, if similar taxes are imposed on goods produced or manufactured in that Stage (Art. 304(a)); and lastly (7) restrictions imposed by existing laws have been continued, except in so far as the President may by order otherwise direct (Art. 305)."

46. The majority consisting of Gajendragadkar, Wanchoo and Dasgupta, JJ. did not agree with the Chief Justice and held as under:

" It is a federal constitution which we are interpreting and so the impact of Art. 301 must be judged accordingly. Besides, it is not irrelevant to remember in this connection that the Article we are construing imposes a constitutional limitation on the power of the Parliament and the State Legislatures to levy taxes, and generally, but for such limitation, the power of taxation would be presumed to be for public good and would not be subject to judicial review or scrutiny. Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Art. 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly & immediately restrict trade that would fall within the purview of Art. 301. The argument that all taxes should be governed by Art. 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld."

47. The third view was expressed by Shah J. who held that the freedom contemplated under Article 301 was freedom of

trade, commerce and inter-course in all their varied aspects inclusive of all activities which constitute commercial inter-course and not merely restrictions on the movement aspect and observed as under:

" The guarantee of freedom of trade and commerce is not addressed merely against prohibitions, complete or partial; it is addressed to tariffs, licensing, marketing regulations, price-control, nationalisation, economic or social planning, discriminatory tariffs, compulsory appropriation of goods, freezing or stand-still orders and similar other impediments operating directly and immediately on the freedom of commercial intercourse as well. Every sequence in the series of operations which constitutes trade or commerce is an act of trade or commerce and burdens or impediments imposed on any such step are restrictions on the freedom of trade, commerce and intercourse. What is guaranteed is freedom in its widest amplitude-freedom from prohibition, control, burden or impediment in commercial intercourse."

48. In Automobile Transport Ltd. v. State of Rajasthan (supra), a seven-Judges Bench of the Supreme Court considered the constitutional validity of Rajasthan Motor Vehicles Taxation Act, 1951. Four of the Judges constituting the Bench disapproved the extreme views expressed by B.P.Sinha, C.J. and Shah J. in Atiabari Tea Co. Ltd. v. State of Assam and others (supra). They also explained the majority view in the following words:

" If the word `free' in Art. 301 means `freedom to do whatever one wants to do' then chaos may be the result; for example, one owner of a motor vehicle may wish to drive on the left of the road. If they come from opposite directions, there will be an inevitable clash. Another class of examples relates to making a charge for the use of trading facilities, such as, road, bridges, aerodromes etc. The collection of a toll or a tax for the use of a road or for the use of a bridge or for

the use of an aerodrome is no barrier or burden or deterrent to traders who, in their absence, may have to take a longer or less convenient or more expensive route. Such compensatory taxes are no hindrance to anybody's freedom so long as they remain reasonable; but they could of course be converted into a hindrance to the freedom of trade. If the authorities concerned really wanted to hamper anybody's trade, they could easily raise the amount of tax or toll to an amount which would be prohibitive or deterrent or create other impediments which instead of facilitating trade and commerce would hamper them. It is here that the contrast, between `freedom' (Art. 301) and `restrictions' (Arts. 302 and 304) clearly appears: that which in reality facilitates trade and commerce is not a restriction, and that which is reality hampers or burdens trade and commerce is a restriction. It is the reality or substance of the matter that has to be determined. It is not possible a priori to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to a trade but the distinction, if it has to be drawn, is real and clear. For the tax to become a prohibited tax it has to be a direct tax the effect of which is to hinder the movement part of trade. So long as a tax remains compensatory or regulatory it cannot operate as a hindrance.

....

In our view the concept of freedom of trade, commerce and intercourse postulated by Art. 301 must be understood in the context of an orderly society and as part of a Constitution which envisages a distribution of powers between the States and the Union, and if so understood, the concept must recognise the need and the legitimacy of some degree of regulatory control, whether by the Union or the States : this is irrespective of the restrictions imposed by the other articles in Part XIII of the Constitution. We are, therefore, unable to

accept the widest view as the correct interpretation of the relevant articles in Part XIII of the Constitution."

... .

We have, therefore, come to the conclusion that neither the widest interpretation nor the narrow interpretations canvassed before us are acceptable. The interpretation which was accepted by the majority in the Atiabari Tea Co. case, (1961) 1 SCR 809 : (AIR 1961 SC 232) is correct, but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Art. 304(b) of the Constitution." (Underlining is ours).

49. The Court also rejected the argument that tax cannot be regarded as compensatory if the amount collected is not actually used for providing any facility and held that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. Their Lordships further observed that it would be impossible to judge the compensatory nature of a tax by a meticulous test.

50. The decisions of the Supreme Court in Atiabari Tea Co. v. State of Assam (supra) and Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan (supra) came up for consideration before a Constitution Bench in Khyerbari Tea Co. Ltd. v. State of Assam, AIR 1964 SC 925. Speaking for the Bench, Gajendragadkar, J. (as his Lordship then was), referred to the majority and minority views in Atiabari Tea Company v. State of Assam (supra) and Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan (supra) and observed as under:

"In the Automobile Transport (Rajasthan) Ltd.'s case, 1963-I SCR 491: (AIR 1962 SC 1406) the majority view expressed by Das, J. on behalf of himself and Kapur and Sarkar, JJ. was that if a tax is compensatory in character, it cannot be said to fall within the mischief of Art.301. According to this view, a clarificatory rider was added to the majority view expressed in the case of Atiabari Tea Co. Ltd. 1961-I SCR 809: (AIR 1961 SC 232) by providing that regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Art.301 and such measures need not comply with the requirements of the provisions of Art. 304(b).

Subha Rao, J. who delivered a separate judgment concurring with the conclusion reached by Das J. preferred to emphasise that taxing statutes which would escape the mischief of Art. 301 could be appropriately described as regulatory. He, therefore, held that the Rajasthan Motor Vehicles Taxation Act (No.11 of 1951) with which the Bench was dealing, was regulatory in character and as such not unconstitutional. In other words, whereas Das, Kapur and Sarkar, JJ. upheld the validity of the Act on the ground that it was either compensatory or regulatory, Subha Rao, J. preferred to base his decision mainly on the ground that it was regulatory.

The minority view which has been expressed by Hidayatullah, J. on behalf of himself and Ayyangar and Mudholkar, JJ. assumed that though regulatory taxing statutes may be said to fall outside Art. 301, conmpensatory taxing statutes cannot make the same claim. According to this view, if a taxing statute was sought to be justified on the ground that the tax imposed by it was compensatory in character, that could be done only by adopting the procedure prescribed by Art. 304(b). It may be noticed that the scope of the regulatory

statutes as discussed by Hidayatullah J. is much narrower than the scope of the regulatory statutes as considered by Subba Rao, J.

In the result, the majority view expressed in the case of the Atiabari Tea Co. Ltd. 1961-I SCR 809: (AIR 1961 SC 232) was substantially accepted by the majority of the learned Judges constituting the larger Benchwhich heard Automobile Transport (Rajasthan) Ltd. case, 1963-I, SCR 491: (AIR 1962 SC 1406) but a corollary was added to the said view as we have just indicated.

The majority view in the Atiabari case, 1961-I SCR 809: (AIR 1961 SC 232) proceeded on the basis that the Australian decisions which dealt with the scope and effect of S.92 of the Australian Constitution would be of no assistance in construing the effect of the provisions in Part-XIII of our Constitution, because the legislative, historical and political background, the structure and the effect of the relevant provisions contained in Part XIII were in material particulars different from those of S.92 of the Australian Constitution; S.92 is absolute in terms and on its literal construction, admits of no exceptions. The Australian decisions, therefore, had to introduce distinctions, such as compensatory or regulatory tax laws in order to take laws answering the said description out of the purview of S.92. In our Constitution, however, though Art.301 is worded substantially in the same way as S.92, Arts.302 and 304 provide for reasonable restrictions being imposed on the freedom of trade subject to the requirements of the said two articles, and so the problem facing judicial decisions in Australia and in this country in regard to the freedom of trade and the restrictions which it may be permissible to impose on it, is not exactly the same. The minority view expressed by Hidayatullah J. has pointedly referred to this aspect of the matter. That, in brief, is the position of the two decisions of this Court in Atiabari Tea Co.

Ltd. 1961-I SCR 809: (AIR 1961 SC 232) and Automobile Transport (Rajasthan) Ltd.1963-I SCR 491: (AIR 1962 SC 1406) cases respectively.

....

It would immediately be noticed that though the majority view in the Automobile Transport (Rajasthan) Ltd. case (1963) 1 SCR 491: AIR 1962 SC 1406, substantially agreed with the majority decision in the case of Atiabari Tea Co. (1961) 1 SCR 809: AIR 1961 SC 232, there would be a clear difference between the said two views in relation to the scope and effect of the provisions of Article 304(b). According to the majority view in the case of Atiabari Tea Co. Ltd. (1961) 1 SCR 809: AIR 1961 SC 232 if an Act is passed under Article 304(b) and its validity is impeached, then the State may seek to justify the Act on the ground that the restrictions imposed by it are reasonable and in the public interest, and in doing so, it may for instance, rely on the fact that the taxes levied by the impugned Act are compensatory in character. On the other hand, according to the majority decision in the Automobile Transport (Rajasthan) Ltd. case (1963) 1 SCR 491: AIR 1962 SC 1406, compensatory taxation would be outside Article 301 and cannot, therefore, fall under Article 304(b)....."

51. In Kalyani Stores v. State of Orissa and others, AIR 1966 SC 1686, a Constitution Bench of the Supreme Court struck down the notification issued by the State Government under Bihar and Orissa Excise Act, 1915 for levy of countervailing duty on foreign liquor imported into the State by declaring it to be violative of Articles 301 and 304 of the Constitution. The facts of that case were that the appellant, who was dealing in liquor at Rourkela in Orissa challenged the imposition of a duty of excise on foreign liquor imported into the State levied at first at Rs.40 per L.P.Gallon and from April 1,1961 at Rs.70 under Section 27 of the Bihar and

Orissa Excise Act, 1915. The argument of the appellant was that the duty amounted to unreasonable restriction on the freedom of trade and commerce because foreign liquor is not manufactured in the State and as such, no duty of excise could be levied on the locally manufactured foreign liquor. By a majority of 4:1, their Lordships of the Supreme Court upheld the challenge and observed as under:

"The notification levying duty at the enhanced rate is purely a fiscal measure and cannot be said to be a reasonable restriction on the freedom of trade in the public interest. Article 301 has declared freedom of trade, commerce and inter-course throughout the territory of India, and restriction on that freedom may only be justified if it falls within Art.304. Reasonableness of the restriction would have to be adjudged in the light of the purpose for which the restriction is imposed, that is, "as may be required in the public interest." Without entering upon an exhaustive categorization of what may be deemed "required in the public interest", it may be said that restrictions which may validly be imposed under Art.304(b) are those which seek to protect public health, safety, morals and property within the territory. Exercise of the power under Art. 304(a) can only be effective if the tax or duty imposed on goods imported from other States and the Tax or duty imposed on similar goods manufactured or produced in that State are such that there is no discrimination against imported goods. As no foreign liquor is produced or manufactured in the State of Orissa the power to legislate given by Art.304 is not available and the restriction which is declared on the freedom of trade, commerce or intercourse by Art.304 of the Constitution remains unfettered."

52. The same issue was again considered by the Supreme Court in State of Kerala v. A.B. Abdul Kadir and others, AIR 1970 SC 1912. The facts of that case were that the respondents who were dealers in tobacco and tobacco

preparation challenged the levy of fee. The High Court dismissed the writ petition but, on appeal, the Supreme Court held that the rules framed for levy of fee were invalid. Thereafter, the Government of Kerala promulgated the Kerala Luxury Tax on Tobacco (Validation) Ordinance No.1 of 1963 which was later replaced by Act No.9 of 1964. The amended Act was challenged on the ground that it was violative of Articles 301 and 304 of the Constitution. The High Court applied the ratio of Kalyani Stores v. State of Orissa and others (supra) and held that the impugned legislation was ultra vires to Article 304(a) of the Constitution. The Supreme Court reversed the judgment of the High Court and explained the judgment of Kalyani Stores v. State of Orissa and others (supra) in the following words:

"The decision was based on the assumption that notification dated March 31, 1961 enhancing duty on foreign liquor infringed the guarantee under Article 301 and may be saved if it fell within the exceptions contained in Article 304 of the Constitution. The Court did not intend to lay down the proposition that the imposition of a duty or tax in every case would be tantamount per se to an infringement of Art.301. As we have already pointed out it is well established by numerous authorities of this Court that only such restrictions or impediments which directly or immediately impede the free flow of trade, commerce and intercourse fall within the prohibition imposed by Art.301. A tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. Every case must be judged on its own facts and in its own setting of time and circumstance. In the present case, the High Court has not gone into the question whether the provisions of Act 9 of 1964 and the notification dated January 25,1951 issued under the Cochin Tobacco Act constitute such restrictions or impediments as directly and immediately hamper free flow of

trade, commerce and intercourse and, therefore, fall within the prohibition imposed under Art. 301 of the Constitution. Unless the High Court first comes to the finding on the available material whether or not there is infringement of the guarantee under Art. 301 of the Constitution, the further question as to whether the statute is saved under Art. 304 (b) does not arise and the principle laid down by this Court in Kalyani Stores case (1966) 1 SCR 865=(AIR 1966 SC 1686) cannot be invoked."

53. In G.K.Krishnan v. State of Tamil Nadu and another, AIR 1975 SC 583, the Supreme Court considered the challenge to the Madras Motor Vehicles Taxation Act, 1931 on the ground of violation of Articles 14, 19(1)(g), 301 and 304 of the Constitution. Their Lordships referred to the majority judgment in Atiabari Tea Co. v. State of Assam (supra) which had propounded the direct and immediate restriction test for judging the constitutionality of the taxing statutes in the context of Article 301 and proceeded to observe as under:

"The direct and immediate restriction test had great adverse effect upon the financial autonomy of States. For instance, a law passed by a State Legislature under Entry 56 in List II, namely "taxes on goods and passengers carried by road or on inland waterways" would be a restriction which is immediate and direct on the movement part of trade and commerce and would be bad. This means that Entry 56 in List II is rendered otiose.

In view of the grave impact of this judgment, when appeals from Rajasthan High Court came up for consideration in Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, (1963) 1 SCR 491= (AIR 1962 SC 1406) (hereinafter referred to as the "Automobile case"), a larger Bench was constituted and that Bench considered the question once again. The appellants in that case impugned the

Rajasthan Motor Vehicles Taxation Act, 1951 inter alia as violating Article 301. The High Court dismissed the petitions and this Court, by a majority of 4 to 3 held that the Act was valid and dismissed the appeals. The case practically overruled the decision in Atiabari case (161) 1 SCR 809= (AIR 1961 SC 232), insofar as it held that if a State Legislature wanted to impose tax to raise moneys necessary in order to maintain roads, that could only be done after obtaining the sanction of the President as provided in Article 304(b). In Khyerbari Tea Co. Ltd. v. State of Assam, (1964) 5 SCR 975 = (AIR 1964 SC 925) it was said that the decision in Atiabari case was affirmed in Automobile case with a clarification that regulatory measures or measures imposing compensatory tax do not come within the purview of restrictions contemplated in Art.301 and that such measures need not comply with the requirement of the provisions of Article 304(b). In whatever way one may choose to put it, the effect of the majority decision in the Automobile case is tht a compensatory tax is not a restriction upon the movement part of trade and commerce.

....

Regulations like rules of traffic facilitate freedom of trade and commerce whereas restrictions impede that freedom. The collection of toll or tax for the use of roads, bridges, or aerodromes, etc., do not operate as barriers or hindrance to trade. For a tax to become a prohibited tax, it has to be a direct tax, the effect of which is to hinder the movement part of the trade. If the tax is compensatory or regulatory, it cannot operate as a restriction on the freedom of trade or commerce.

....

Strictly speaking, compensatory tax is based on the nature and the extent of the use made of the roads, as, for example, a mileage or ton-mileage charge or the like, and if the proceeds are devoted to the repair, upkeep, maintenance

and depreciation of relevant roads and the collection of the exaction involves no substantial interference with the movement. What is essential for the purpose of securing freedom of movement by road is that no pecuniary burden should be placed upon it which goes beyond a proper recompense to the State for the actual use made of the physical facilities provided in the shape of a road."

54. We may now refer to some judgments of the Supreme Court and the High Courts in which the constitutionality of the entry tax was challenged on the ground of violation of Articles 301 and 304. In State of Karnataka v. M/s Hansa Corporation, AIR 1981 SC 463, the Supreme Court examined the constitutionality of Karnataka Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act, 1979. Section 3 of that Act empowered the State Government to levy and collect tax on entry of scheduled goods into a local area for consumption, use or sale therein at a rate not exceeding 2% ad valorem. Vide notification dated 31.5.1979, the State Government specified the local areas and the rates at which the tax was to be paid on the entry of scheduled goods. The High Court of Karnataka struck down the impugned legislation and the notification on the ground that Section 3 did not empower the State Government to apply the provisions of the Act to certain local areas only and to exclude other local areas and that non-exemption of petty dealers amounted to unreasonable restriction on them. On appeal by the State, the Supreme Court reversed the judgment of the High Court. While repelling the challenge based on the ground of violation of Articles 301 and 304, their Lordships referred to the decisions of Atiabari Tea Co. Ltd. v. State of Assam and others (supra), Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan (supra) and Khyerbari Tea Co. Ltd. v. State of Assam and others (supra) and held as under:

"On a conspectus of these decisions, it appears well settled that if a tax is compensatory in character it would be immune from the challenge under Article 301. If on the other hand, the tax is not shown to be compensatory in character it would be necessary for the party seeking to sustain the validity of the tax law to show that the requirements of Art. 304 have been satisfied.

....

Article 304 lifts the embargo placed on the legislative power of State to enact law which may infringe the freedom of inter- State trade and commerce of its requirements are fulfilled. Article 304(a) imposes a restriction on the power of legislature of a State to levy tax which may be discriminatory in character by according discriminatory treatment to goods manufactured in the State and identical goods imported from outside the State. The effect of Art.304(a) is to treat imported goods on the same basis as goods manufactured or produced in a State. This Article further enables the State to levy tax on such imported goods in the same manner and to the same extent as may be levied on the goods manufactured or produced inside the State. If a State tax law accords identical treatment in the matter of levy and collection of tax on the goods manufactured within the State and identical goods imported from outside the State, Art. 304(a) would be complied with. There is an underlying assumption in Art. 304 (a) that such a tax when levied within the constraints of Art. 304(a) would not be violative of Art. 301 and State Legislature has the power to levy such tax.

....

Tax under the impugned legislation would be levied on scheduled goods either manufactured or produced within Karnataka State or imported from outside on their entry in a local area. Thus, this tax is non-discriminatory in that it does not discriminate between scheduled goods manufactured or

produced within Karnataka State or those imported from outside. And the microscopic discrimination relied upon by the respondents that there is differential treatment accorded to goods produced within a local area and those imported from outside the local area is hardly relevant for the purpose of Art. 304(a). The High Court was accordingly right in concluding that the impugned tax satisfies the requirements of Art. 304 (a).

....

The next question is whether this levy is in public interest. As has been pointed out earlier, the levy was to compensate the loss suffered by abolition of octroi. These very people were paying octroi without a demur. After removing the obnoxious features of octroi a very modest impact levied on entry of goods in a local area and that too not for further augmenting finances of the municipalities but for compensating the loss suffered by the abolition of octroi is certainly a levy in public interest. As has been repeatedly observed by this Court, the taxes generally are imposed for raising public revenue for better governance of the country and for carrying out welfare activities of our welfare State envisaged in the constitution and, therefore, even if a tax to some extent imposes an economic impediment to the activity taxed, that by itself is not sufficient either to stigmatise the levy as unreasonable or not in public interest." (Underlining is ours).

55. The argument that the impugned legislation was bad due to non-compliance of Article 304(b) was rejected by the Supreme Court in the following words:

"The last limb of the argument is whether the proviso to Art. 304(b) is satisfied or not. The proviso imposes an obligation to obtain the Presidential sanction before introducing the bill or amendment for the purpose of clause (b) of Art. 304 in the legislature of a State. It cannot be

gainsaid that Presidential sanction was not obtained before introducing the bill which was ultimately enacted into the impugned Act but after the bill was enacted into an Act the same was submitted to the President for his assent and it is common ground that the President has accorded his assent. If prior presidential sanction is a sine qua non, the requirement of the proviso is not satisfied but in this context it would be advantageous to refer to Art. 255 which provides that no Act of Parliament or of the Legislature of a State and no provision in any such Act shall be invalid by reason only that some recommendation or previous sanction required by the Constitution was not given if assent to that Act was given by the President. Now, in this case, it is common ground that the President did accord his sanction to the impugned Act. Therefore, the requirement of the proviso is satisfied."

56. The Apex Court also rejected the plea that the Act amounted to unreasonable restriction on the fundamental rights of the petty dealers to carry on their trade and observed as under:

"Looking at the matter from a slightly different angle it must be confessed that if the contention of the respondents were to be upheld it would provide a fruitful source for evasion of tax. If petty dealers are to be excluded some criterion will have to be provided relatable to his turnover in scheduled goods for classifying who are petty dealers. That turnover will have to be kept reasonably high to make it rational but in that event the big registered dealer can always conveniently defeat the tax by bringing into the local area scheduled goods in the name of such petty dealer. It would be an incentive to a big registered dealer to set up a number of petty dealers and import scheduled goods into local area in the name of those petty dealers. To avoid any such contingency, if the tax is levied on the entry of scheduled goods in the local area at the hands of a dealer irrespective of his turnover a

potential source of evasion can be checkmated. Viewed from either angle, non- exemption of petty dealers from the operation of the Act does not lead to the conclusion that the impugned legislation constitutes unreasonable restrictions on the fundamental right of the petty dealers to carry on their trade or business. The High Court was, therefore, in our opinion, in error in striking down the impugned legislation on the ground that the Act imposes unreasonable restrictions on the fundamental right of the petty dealers to carry on their trade."

57. In Suresh Chand Sri Gopal v. Union of India (supra), the Supreme Court considered the constitutional validity of Andhra Pradesh Entry of Goods into Local Area Tax Act, 1987, which is pari materia to the Entry Tax Act, and rejected the challenge based on the ground that it was beyond the legislative competence of the State and there was no provision to hand over the tax to the local authorities. Some of the observations made on this aspect of the matter are extracted below:

"If the State Legislature makes a law levying a tax on entry of goods into a local area for consumption, use, or sale therein, it cannot be said to be beyond its competence, or beyond its legislative power. It is very much within its legislative competence. Either for the sake of uniformity, or in the interest of administrative convenience a particular State Legislature may think it appropriate to levy the tax by itself, while another legislature may choose to follow the other course, viz., to empower the local authorities themselves to levy and collect this tax. It is true that the tax being on the entry of goods into a local area for consumption, use or sale in such local area has always been understood and meant for the benefit of such local authority. " (Underlining is ours).

58. It was argued that the impugned legislation was bad because it did not contain any indication about the utilisation

of the tax upon the local bodies. The Supreme Court negatived this ground of challenge and observed as under:

"How the tax collected will be utilised or apportioned is not a matter affecting the levy, nor is it a matter affecting the legislative power of the body enacting that law. As observed by the Supreme Court in Jaora Sugar Mills v. State of M.P., AIR 1966 SC 416, "it is difficult to understand how the Act can be said to be invalid because the cases recovered under it are not dealt with in the manner provided by the Constitution. The validity of the Act must be judged in the light of the legislative competence of the legislature which passes the Act and may have to be examined in certain cases by reference to the question as to whether fundamental rights of citizens have been improperly contravened, or other considerations which may be relevant in that behalf. Normally, it would be inappropriate and indeed illegitimate to hold an enquiry into the manner in which the funds raised by an Act would be dealt with when the court is considering the question about the validity of the Act itself...". In this case also the argument was that the Act impugned there was passed by the Parliament not for raising funds for the Union of India but for validating the illegal recovery of cesses made by the State Governments, and which funds had already gone into the Consolidated Funds of the respective States. Reliance was placed upon article 266 of the Constitution in that behalf. The aforesaid observations were made negativing the said contention. The Court further observed:

".... if the taxes or cesses recovered under an Act are not dealt with in the manner prescribed by the Constitution, what remedy a citizen may have and how it can be enforced, are questions on which we express no opinion in this appeal."

59. Their Lordships also rejected the challenge that the impugned levy should be treated as sales tax because the machinery created under the Sales Tax Act is employed for

the purpose of implementing the provisions of the Act by observing as under:

"We find no substance in the argument that the impugned Act levies sales tax on sales tax. Sales tax and entry tax are provided by different entries in List II, i.e., entry 54 and entry 52, respectively. Just because the machinery created under the Sales Tax Act is employed for the purpose of implementing the provisions of this Act, it cannot be said to be a sales tax in substance, nor can it be called a sales tax on sales tax."

60. The challenge based on Articles 301 and 304 of the Constitution was rejected by the Supreme Court with the following observations:

"We are equally unable to see any substance in the argument based on Articles 301 and 304. No material has been placed before us to show that the impugned tax has the effect of impeding the free flow of trade, commerce, or intercourse, either within the State or with the State.

Even if it is assumed that the said tax does amount to a restriction, it cannot be said to be unreasonable, since the rate of tax is only 1per cent on textiles, 2 per cent on sugar, and 4 per cent on tobacco. Reasonable restrictions on the freedom of trade, commerce, or intercourse can be placed by the State Legislature, provided the Bill is moved in the Legislature of the State with the previous sanction of the President. In this case, it is true, before moving the Bill in the Legislature, previous sanction of the President was not obtained; but, after the Act was passed by the Legislature, it was reserved for, and obtained the assent of the President. As held by the Supreme Court in Atibari Tea Company Ltd. v. State of Assam, AIR 1961 SC 232 and Automobile Transport v. State of Rajasthan, AIR 1962 SC 1406 such an assent cures the defect, if any, in not obtaining the previous sanction of the President before introducing the Bill."

61. In Bhagat Ram Rajeev Kumar v. Commissioner of Sales Tax, Madhya Pradesh and others (supra), a three-Judges Bench of the Supreme Court considered the validity of M.P.Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 and rejected the challenge based on the ground that those who were not liable to pay sales tax were exempted and that it was violative of Article 301 of the Constitution. The relevant observations made on these issues are extracted below:

"Liability to pay sales tax on the goods specified in Schedule II is thus not an essential ingredient of levy. The expression "liable to tax" has been used to identify the person who shall pay the entry tax. To put it conversely if any goods mentioned in Schedule II are brought from outside the State by a person who is not liable to tax under the Sales Tax Act then entry tax shall not be realised from such person. The intention is to levy tax only when the goods are brought inside the State by a dealer carrying on business whose turnover is not less than Rs.1,000 annually and not by any other person. In other words, the tax is leviable on all goods specified in Schedule II brought for consumption, use or sale; but it shall be realised only from those persons who are dealers registered under the Sales Tax Act and are liable to pay tax. The expression "liability to tax" is determinative of the person from whom the tax shall be realised and not of the goods which could be subjected to levy. The construction suggested by the learned counsel for the appellant militates against the clear language of the section as the levy being on goods specified in Schedule II. If the submission is accepted then it would result in non-levy on those items on which additional excise duty is leviable.

....

Even the submission on article 301 of the Constitution is not well-founded. The article came up for interpretation by

this Court in Atibari Co. Ltd. v. State of Assam (1961) 1 SCR 809: AIR 1961 SC 232 and Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan (1963) 1 SCR 491: AIR 1962 SC 1406. A combined reading of the two decisions indicates that so long as a tax is regulatory and compensatory it is not within the mischief of Article 301. In the counter- affidavit filed on behalf of the State which was not disputed, the nature of levy has been demonstrated to be compensatory. The appellants did not dispute the figure furnished by the State. It is settled by now that if the tax is compensatory then it is immune from challenge under Article 301 (see Khyerbari Tea Co. Ltd. v. State of Assam (1964) 5 SCR 975: AIR 1964 SC 925 and State of Karnataka v. Hansa Corporation, (1981) 1 SCR 823: AIR 1981 SC 463. The submission of Shri Ashok Sen, learned Senior Counsel, that compensation is that which facilitates the trade only does not appear to be sound. The concept of compensatory nature of tax has been widened and if there is substantial or even some link between the tax and the facilities extended to such dealers directly or indirectly the levy cannot be impugned as invalid. The stand of the State that the revenue earned is being made over to the local bodies to compensate them for the loss caused, makes the impost compensatory in nature, as augmentation of their finance would enable them to provide municipal services more efficiently, which would help or ease free-flow of trade and commerce, because of which the impost has to be regarded as compensatory in nature, in view of what has been stated in the aforesaid decisions, more particularly in Hansa Corporation's case (1981) 1 SCR 823: AIR 1981 SC 463." (Underlining is ours).

62. In Sanjay Trading Co. v. Commissioner of Sales Tax and others (supra), a Division Bench of Madhya Pradesh High Court considered the constitutionality of Madhya Pradesh Entry Tax Act, 1976. It was argued on behalf of the

petitioners that the impugned enactment is ultra vires to Articles 19(1)(g), 286(3) and 304(a) of the Constitution. The petitioner relied on Entries 92A and 92B of List-II. While rejecting the argument that the State Legislature was not competent to enact such law and only the Parliament was competent to do so, the Division Bench of the High Court observed as under:

"Item 54 of List II of the Seventh Schedule to the Constitution relates to tax on sale or purchase of goods subject to the provisions of entry 92-A of List I. Item 52 of List II relates to tax on entry of goods into local area for consumption, use or sale therein. Item 92-A of List I relates to the sale of goods other than newspapers, where such sale or purchase takes place in the course other than newspaper, where such sale or purchase takes place in the course of inter-State trade or commerce. Item 92-B of List I relates to tax on consignment of goods. Tax on sale or purchase, tax on entry of goods into local area for consumption, use or sale therein and tax on consignment of goods are different in nature and character and are imposed by local authorities under separate laws. Octroi is in the nature of a multi-point imposition. Various State Legislatures, a multi-point imposition and at the same time, legislated on single point entry tax for the purpose of compensating the local authorities who suffered loss of revenue on account of abolition of octroi.

Single point entry tax is a substitute for multi-point octroi and falls within the ambit of entry 52 of List II. It is a tax on entry and does not restrict freedom of trade or commerce, as is made clear in Transport Corporation of India v. Chairman Municipal Council, Municipal Corporation, Indore AIR 1963 MP 253 and City Municipality v. Mahado Seetha Ram AIR 1967 AP 363. It is true that State Legislature is competent to levy entry tax only in respect of goods brought into a local area for the purposes of consumption, use

or sale. Even where words of wide and general import are used, it has to be presumed that competence to legislate and to no other. (See Jothi Timber Mart v. Corporation of Calicut AIR 1970 SC 264).

We have adverted to the scheme of the provisions of the Entry Tax Act. The Act is intended to levy entry tax on entry of specified goods into local area for consumption, use or sale. It is not possible to accept that in pith and substance, the Act levies entry tax on entry of all goods, irrespective of the purpose of entry. That the purpose of the entry is fundamental to the levy is made clear by the presumption laid down in section 6 as if goods are consumed, used or sold in local area by the dealer or other person, it shall be presumed, until the contrary is proved by him, that such goods are entered into local area for consumption, use or sale therein. Where the dealer purchases specified goods in a local area from a person or dealer who is not a registered dealer, it shall be presumed, until the contrary is proved by him, that the entry of goods had been effected by him into the local area. Section II deals with burden of proof of certain aspects and makes the matter cleaner. The burden of proving that a dealer or a notified person has not effected entry of specified goods in the local area for consumption, use or sale therein, lies on him. The Rules framed under the Act provide among other things, for furnishing of returns, payment of tax or penalty imposed on him, order of assessment and form thereof, authority and manner for assessment of tax and appeal or revision against the order of assessment. These provisions completely negative the contention of the petitioners that in pith and substance, entry tax contemplated under the Act is a tax on entry and amounts to purchase tax. Therefore, article 286(3) of the Constitution and section 15 of the Central Sales Tax Act, 1956, are not attracted to this legislation. The point is answered against the petitioners.

For the same reasons as aforesaid, it has to be held that levy of entry tax does not amount to levy of consignment tax and the contention that it offends article 92-A of List I of the Constitution is not tenable."

63. The challenge based on violation of Article 304(a) of the Constitution was rejected by the High Court in the following words: "This is a provision enabling the State Legislature to introduce certain restrictions on trade, commerce and intercourse amongst States. There may be Sales tax imposed on goods imported from other States or Union territories to which similar goods manufactured in that State are subject to as not to discriminate between the goods so imported and goods manufactured. What is contemplated is a tax imposed on goods imported from outside the State. Entry tax is not a tax on goods, but a tax on entry of goods into a local area for particular purposes. Entry tax would be levied on specified goods either manufactured or produced within the State or imported from outside on their entry into a local area. The tax does not discriminate between the specified goods manufactured or produced within the State or those imported from outside. The differential treatment accorded to goods produced within the area and those imported from outside the area is microscopic and irrelevant for the purpose of article 304(a). (See State of Karnataka v. Hansa Corporation AIR 1981 SC 463). Therefore, article 304 (a) of the Constitution is not attracted." (Underlining is ours)

64. The argument that the tax was not compensatory in character was also rejected by the High Court in the following words:

"In the present case, the State has taken stand that the levy of entry tax is compensatory in character, i.e. to compensate the municipalities for loss of income by way of octroi which has been abolished in the State. This contention is met by learned counsel for the petitioners by pointing out

that the legislative provisions indicative of the compensatory nature of the levy, have been deleted and, therefore, it is not longer open to the State to contend that the levy is compensatory in character.

Section 17 of the Act, as it originally stood, required that the tax collected shall be credited to the consolidated fund of the State and that net tax collection be placed to the credit of M.P.Octroi Compensation Fund under section 7-B of the Sales Tax Act. By Act No.24 of 1978, this provision was omitted with effect from April 1,1978. Section 7-B was introduced in the Sales Tax Act with effect from October 1,1978, specifically providing for grant-in-aid for loss of octroi to the municipality. This provision was deleted in 1990. This is the foundation for the contention that the entry is not compensatory in character.

The Statement of Objects and Reasons of the Act states that it is enacted to levy a tax on entry of goods in lieu of octroi tax collected by the municipalities and municipal corporations and to make transportation of goods trouble-free by abolishing octroi check-posts. A copy of the Statement of Objects and Reasons is found in annexure A.R-1 appended to the additional submissions made on behalf of the respondents in M.P. No. 2289 of 1989. It indicates that the statue had the view of raising financial resources to compensate local bodies consequent upon abolition of octroi with a view to simplifying the taxation structure. Annexure A.R-3 gives summary in respect of levy and details of allotment made to local bodies. The document shows that during the period 1976-77 till 1988-89, provision was made in the budget to compensate the municipalities and the amount budgeted was made over. It also shows that with effect from the year 1983-84, there has been a regular annual increase of 10 per cent in total compensation amount. Considering the Statement of Objects and Reasons and the particulars given in annexure

A.R-3, the statutory changes referred to above have no significance. Entry tax remains compensatory in nature and, therefore, it is immune from challenge."

65. In State of Bihar v. Bihar Chamber of Commerce (supra), the Supreme Court examined the challenge to the constitutional validity of Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act, 1993 which provided for levy of tax on entry of scheduled goods into a local area for consumption, use or sale therein at a rate not exceeding 5%. The expression "local areas" was defined in Section 2(f) of the Act to mean the areas within the limits of a --(i) Municipal Corporation; (ii) Municipality; (iii) Notified Area Committee; (iv) Cantonment Board; (v) Town Board; (vi) Mines Board; (vii) Municipal Board; (viii) Gram Panchayat; and (ix) any other local authority irrespective of the nomenclature. Section 3 of the Act provided for levy of tax on the entry of scheduled goods into a local area for consumption, use or sale therein. Sub-section (3) of Section 3 empowered the State Government to specify different rates of taxes for different goods. The Patna High Court allowed the bunch of petitions and struck down the impugned Act being violative of Articles 14 and 301 of the Constitution. Their Lordships of the Supreme Court formulated the following questions for consideration:

"(1) Whether the impugned tax has been established to be compensatory in nature or whether it can be called a regulatory measure?

(2) In case the impugned tax is not established to be compensatory -- or as a measure of regulation -- whether it is saved by virtue of the provision contained in Article 304(b) read with Article 255 of the Constitution? In other words (a) whether the Act has received the assent of the President as alleged by the State, (b) whether the levy of the said tax

constitutes a reasonable restriction and (c) whether the said levy is conceived in public interest?

(3) Whether the Bihar Legislature is deprived of its legislative competence to enact the impugned Act on account of the enactment of ADE Act and/or because the State of Bihar is getting a portion of the taxes levied and collected under the ADE Act?

(4) Whether the impugned enactment is outside the purview of entry 52 in List II of the Seventh Schedule to the Constitution and, therefore, beyond the legislative competence of the Bihar Legislature for the reason that it does not provide for the revenues raised thereunder to be passed on to the local authorities for being used for the purpose of the respective local areas ?

(5) Whether the proviso to Section 3(1) and Section 6 are void for the reasons assigned by the High Court ?

66. On the first question, the Court referred to the judgment of the seven-Judges Bench in Automobiles Transport (Rajasthan) Ltd. v. State of Rajasthan (supra) and accepted the argument of the Additional Solicitor General that the tax was compensatory in nature and observed as under:

"Where the local areas contemplated by the Act cover the entire State, the distinction between the State and the local areas practically disappears. (The situation would, no doubt, be different if the local areas are confined to a few cities or towns in the State and the levy is upon the entry of goods into those local areas alone. This is an important distinction which should be kept in mind while appreciating this aspect and also while examining the decisions of this Court rendered in "fifties and sixties"). The facilities provided in the State are that facilities provided in the local areas as well. Interests of the State and the interests of the local authorities are, in essence, no different. It is not and it cannot be stipulated that for the purpose of establishing that every rupee collected on

account of the entry tax should be shown to be spent on providing the trading facilities. It is enough if some connection is established between the tax and the trading facilities provided. The connection can be a direct one or an indirect one, as held by this Court in Bhagatram Rajeev Kumar v. Commissioner of Sales Tax, Madhya Pradesh [1995] 96 STC 654. "The concept of compensatory nature of tax has been widened and if there is substantial or even some link between the tax and the facilities extended to such dealers, directly or indirectly, the levy cannot be impugned as invalid". Though not stated in the counter-affidavit, we can take notice of the fact that the State does provide several facilities to the trade including laying and maintenance of roads, water-ways and markets, etc. As a matter of fact, since the levy is by the State, we must also look to the facilities provided by the State for ascertaining whether the State has established the compensatory character of the tax. On this basis, it must be held that the State has established that the impugned tax is compensatory in nature. (Underlining is ours).

67. On the first part of the second question, the Court accepted the assertion made in the counter affidavit that the Bill had been introduced after the assent of the President had been received. On the second part, the Court referred to the judgments of the Supreme Court in State of Karnataka v. M/s Hansa Corporation (supra) and Bhagatram Rajeev Kumar v. Commissioner of Sales Tax,Madhya Pradesh (supra), Shaktikumar M.Sancheti v. State of Maharashtra (1995) 96 STC 659 and Khyerbari Tea Co. v. State of Assam (supra) and held that the impugned levy was in public interest. On the third question, the Court held that the impugned legislation was not in conflict with Additional Duties of Excise (Goods of Special Importance) Act, 1957. While dealing with the fourth question, the Court noticed some of the judgments

relied upon by the counsel for the appellants and observed as under:

"The tax, by whatever name called, is levied upon the entry of goods into a local area for consumption, use or sale therein. The decisions relied upon by Sri Ganesh too use the same words. Entry 52 empowers the State Legislature to levy this tax. The local authorities cannot themselves levy this tax. The power is that of the State Legislature and of none else. So long as the tax is levied upon the entry of goods into a local area for the purpose of consumption, use or sale therein, the requirement of entry 52 is satisfied. The character of the tax so levied is that of entry tax-by whatever name it is called. The decisions relied upon by Sri Ganesh do not say that the State must levy the tax and make over the collection part of it to local authorities nor do they say that after collecting it, the State must make over the proceeds to the local authorities. The highest that Sri Ganesh can legitimately put his submission is that the tax is meant for and must be utilised for the purpose of the local areas. It cannot further be stipulated that this utilisation should be through or by the concerned local authorities. In our opinion, the relevant requirement is satisfied in this case. As stated hereinbefore, the entire State of Bihar is divided into local areas From the point of view of the entry tax, one may say that the State is a compendium of local areas. Spending for the purposes of the State is thus spending for the purposes of local areas. Situation may perhaps be different where the local areas are confined to a few cities or towns in the State. But where the local areas span the entire State, it cannot be argued that money spend for welfare schemes for improvement of roads, rivers and other means of transport and communication is not spent on or for the purposes of local areas. The purposes and needs of local areas are no different from the purposes and needs of the State-not at any rate to any appreciable degree. In this context,

it is relevant to notice that the Maharashtra Entry Tax Act, considered by this Court in Shaktikumar case [1995] 96 STC 659 was also meant for augmenting the general revenues of State, to wit, to make up the loss of revenue the State was suffering on account of reduction of sales tax on motor vehicles in the adjoining States. The following observations in the said decision tend to support our reasoning, though, it is true, this particular question was not raised therein:

"A very perusal of these objects and reasons would indicate that this legislation was brought in order to compensate loss of revenue by consumers who avoid payment of the sales tax or purchase tax on the vehicle payable in the State by purchasing it in another State where the rate was lesser than the State of Maharashtra and then to bring the vehicle inside the State. The Legislature, therefore, clearly intended to avoid any loss of legitimate sales tax revenue by the State. But the levy cannot be held to be bad because the Legislature intended to avoid any loss of sales tax in the State so long it is not found to be invalid either because of any constitutional or statutory violation. It is not the intention or propriety of a legislation but it is legality or illegality which renders it valid or invalid." (Underlining is ours)

68. In Godfrey Philips India Ltd. v. State of Rajasthan (supra), a Division Bench of Rajasthan High Court rejected the challenge to the constitutionality of Rajasthan Entry of Tax into Local Areas Act, 1999. The said Act was enacted for the levy and collection of tax on entry of goods into local areas in the State of Rajasthan for consumption, use or sale therein and matters incidental thereto. The Division Bench of Rajasthan High Court referred to the various decisions of the Supreme Court and the High Courts and held that the Act was not violative of Articles 301 and 304(b) of the Constitution by recording the following observations:

"Indisputably, octroi is abolished in State of Rajasthan. Due to abolition of octroi, the local bodies, i.e., panchayats, established under the Rajasthan Panchayati Raj Act, 1994, municipalities, established under the Rajasthan Municipal Act, 1959 and notified area committees and cantonment boards suffered a financial dent, on account of abolition of octroi cannot be ruled out. In our considered opinion, after abolition of obnoxious features of octroi, a very modest impost is levied in the State of Rajasthan by enacting Act No.13 of 1999. The State Legislature, in exercise of its legislative power, under clause (3) of Article 246 of the Constitution, which provides that subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereunder, with respect to any of the matter enumerated in List II of the Seventh Schedule. In the present case, the State Legislature has exclusive power to legislate upon entry No.52 of List II of the Seventh Schedule, which provides making of laws on tax as on entry of goods into a local area, for consumption, use or sale therein. The State Legislature has enacted Act No.13 of 1999, empowering State Government in charging Section 3 of the said Act to impose a very modest levy of the entry tax on goods brought into local areas, not exceeding ten per cent of the value of goods, for compensating the loss suffered by the abolition of octroi. The State Government by issuing notification on October 15, 1999, annexure 2 to the writ petition under Section 3 of Act No.13 of 1999 has imposed entry tax on tobacco only 1.5 per cent on the value of goods brought into local area is well within the outer limit of ten per cent of the value of goods contemplated under Section 3 of the said Act. Entry tax on tobacco at the rate of 1.5 per cent of the value of goods cannot be said to be unreasonable or excessive by any stretch of imagination. In our view, it is certainly a levy in public interest which is held to be fair and reasonable. Any

enactment enacted by State Legislature in exercise of its legislative power under clause (3) of Article 246 of the Constitution relating to entry No.52 of the State List of the Seventh Schedule neither required Presidential sanction, before introducing the Bill under Article 304(b) nor it required assent of the President. We have no hesitation to hold that Act No.13 of 1999 does not infringe freedom of trade enshrined under Article 301 of the Constitution. In our opinion, if the argument of learned counsel for the petitioners is accepted to the effect that Act No.13 of 1999 is violative of Articles 301 and 304(b) of the Constitution, then, it would render otiose clause (3) of Article 246 of the Constitution and entry 52 in State List of the Seventh Schedule to the Constitution which is not acceptable to us being contrary to federal structure of our Constitution."

69. The following principles can be deduced from the above noted decisions:

(i) The freedom of trade, commerce and inter- course guaranteed under Article 301 is not absolute. A tax can be treated as restriction on this freedom if it hinders the movement part of trade, but so long as the tax remains compensatory or regulatory, it cannot operate as hindrance.

(ii) Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution.

(iii) A tax will be regarded as compensatory tax if it is levied on those using trading facilities which includes roads, bridges, markets and such tax would retain its character as compensatory tax if some link is established between the tax and the facilities extended directly or indirectly to those who are required to pay the tax.

(iv) If the amount collected by the levy of entry tax is meant to compensate the local bodies for the loss caused by abolition of octroi and/or augmentation of finances to enable them to provide municipal services more efficiently which would help the free flow of trade or commerce, the impost will be regarded as compensatory in nature.

(v) While examining the validity of entry tax, it would be inappropriate to the Court to hold an enquiry into the manner in which the funds raised by levy of entry tax would be dealt with and it is sufficient that a provision is made for disbursing the amount to the local bodies for use in the local areas.

(vi) The entry tax is not a tax on goods, but a tax on entry of goods into a local area for particular purposes and even if such tax, to some extent, imposes an economic impediment on the activity taxed, that by itself is not sufficient either to stigmatise the levy as unreasonable or contrary to public interest.

(vii) The entry tax levied on scheduled goods either manufactured or produced within the State or imported from outside on their entry in a local area cannot be treated as discriminatory even if there is microscopic difference in the treatment accorded to the goods produced within the area and those imported from outside the area.

(viii) Where the local areas contemplated by the taxing statute cover the entire State, the distinction between the State and the local areas practically disappears and facilities provided in the State are to be regarded as the facilities provided in the local areas as well. In such a situation, it is not necessary that every rupee collected on account of entry tax should be shown to be spent on providing the trading facilities and it is enough if some connection is established between the tax and the trading facilities provided. The connection can be a direct one or indirect one.

70. We shall now consider whether the tax levied under the Entry Tax Act is compensatory in character and is, therefore, immune from the attack of being violative of Articles 301 and 304 of the Constitution.

71. For the purpose of deciding the afore- mentioned question, we deem it appropriate to refer to 73rd and 74th Constitution Amendment Acts vide which Part-IX and Part-IXA were added to the Constitution for the purpose of conferring autonomy to the local bodies at the grass root level, i.e., Panchayats in the rural areas and Municipalities in the urban areas by declaring them as institutions of self-government and simultaneously conferring upon them powers, authority and duties including the authority to levy, collect and appropriate taxes, tolls etc. Article 243(d) defines the Panchayat as an institution of self-government constituted under Article 243B for rural areas. Likewise, Article 243P (e) defines the `Municipality' as an institution of self-government constituted under Article 243Q. Article 243-G declares that subject to the provisions of this Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self- government and such law may contain provisions for the devolution of powers and responsibilities upon the Panchayats at appropriate level subject to the conditions as may be specified therein, with respect to -- (i) the preparation of plans for economic development and social justice; and (ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule. Identical provision is contained in Article 243W in respect of municipalities with the only difference that the said Article refers to matters listed in Twelfth Schedule. Under Article 243H, the Legislature of a State is empowered to enact law and authorise a Panchayat to

levy, collect and appropriate such taxes, duties, tolls and fees and assign to a Panchayat such taxes, duties, tolls, fees, levied and collected by the State Government for such purposes and subject to such conditions and limits as may be specified in the law. Similarly, under Article 243X, the Legislature of a State can enact law and authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls, fees and assign to a Municipality such taxes, duties, tolls, fees levied and collected by the State Government for such purposes and subject to such conditions and limits as may be specified in the law. Article 243I makes it mandatory for the Governor of a State to constitute a Finance Commission to review the financial position of the Panchayats and to make recommendations to the Governor as to --(a) the principles which should govern -(i) the distribution between the State and the Panchayats of the net proceeds of the taxes, duties, tolls and fees leviable by the State which may be divided between them under Part-IX and the allocation between the Panchayats at all levels of their respective shares of such proceeds; (ii) the determination of taxes, duties, tolls and fees which may be assigned to or appropriated by the Panchayats. Article 243W provides that the Finance Commission constituted under Article 243I (Part-IX) shall also review the financial position of the Municipalities and make recommendations to the Governor as to --(a) the principles which should govern-- (i) the distribution between the State and the Municipalities of the net proceeds of the taxes, duties, tolls and fees leviable by the State, which may be divided between them under Part-IXA and the allocation between the Municipalities at all levels of their respective shares of such proceeds; (ii) the determination of taxes, duties, tolls and fees which may be assigned to or appropriated by the Municipalities. Eleventh and Twelfth Schedules of the Constitution enumerate matters with reference to which

functions can be entrusted to the Panchayats and the Municipalities. These are as under: "

ELEVENTH SCHEDULE

1. Agriculture, including agricultural extension.

2. Land improvement, implementation of land reforms, land consolidation and soil conservation.

3. Minor irrigation,water management and watershed development.

4. Animal husbandry, dairying and poultry.

5. Fisheries.

6. Social forestry and farm forestry.

7. Minor forest produce.

8. Small scale industries, including food processing industries.

9. Khadi, village and cottage industries.

10. Rural housing.

11. Drinking water.

12. Fuel and fodder.

13. Roads, culverts, bridges, ferries, waterways and other means of communication.

14. Rural electrification, including distribution of electricity.

15. Non-conventional energy sources.

16. Poverty alleviation programme.

17. Education, including primary and secondary schools. 18. Technical training and vocational education.

19. Adult and non-formal education.

20. Libraries.

21. Cultural activities.

22. Markets and fairs.

23. Health and sanitation, including hospitals, primary health centres and dispensaries.

24. Family welfare.

25. Women and child development.

26. Social welfare, including welfare of the handicapped and mentally retarded.

27. Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes.

28. Public distribution system.

29. Maintenance of community assets.

TWELFTH SCHEDULE

1. Urban planning including town planning.

2. Regulation of land-use and construction of buildings.

3. Planning for economic and social development.

4. Roads and bridges.

5. Water supply for domestic, industries and commercial purposes.

6. Public health, sanitation conservancy and solid waste management.

7. Fire services."

72. Soon after insertion of Parts-IX and IX-A in the Constitution, the Legislature of the State of Haryana amended the Municipal Act and also enacted the Haryana Panchayati Raj Act, 1994 (for short, `the Panchayati Raj Act') repealing Punjab Gram Panchayat Act, 1952 and Punjab Panchayat Samiti Act, 1961, as applicable to the State of Haryana. This was done solely with the object of bringing the State legislations in tune with the new constitutional provisions. Sections 21, 75 and 137 of the Panchayati Raj Act, which enumerate functions and duties of the Gram Panchayats, Panchayat Samitis and Zila Parishads respectively, are exhaustive reflection of various items specified in Eleventh Schedule of the Constitution. The provisions contained in Chapter V, XI and XVII relate to finances and taxation of the three bodies. Likewise, Sections 66-A and 68-A, which were added in Chapter VI of the Municipal Act, are virtual reproduction of portion of Articles 243W and 243Y of the Constitution. The Panchayati Raj Act and the Municipal Act

impose various duties on the Gram Panchayats, Panchayat Samitis and Zila Parishads in the rural areas and Municipalities in the urban areas. They also contain provision for constitution of funds and utilisation thereof for various development schemes including maintenance of roads, streets, bridges, ferries, waterways, maintenance of hospitals, markets, sanitation, water supply schemes etc. Section 56 of the Municipal Act provides for constitution of municipal fund for each Municipality which shall consist of all sums received by, or on behalf of, the committee under the said Act or otherwise. Section 57(1) provides for application of fund for payment of various dues. Sub-section (2) thereof lays down that subject to the charges specified in sub-section (1) and, to such rules as the State Government may make with respect to the priority to be given to the several duties of the Committee, the municipal fund shall be applicable to the payment in whole or in part, of the charges and expenses incidental to the following matters:

"(a) the construction, maintenance, improvement, cleansing and repair of all public streets, bridges, town-walls, town-gates, embankments, drains, privies, latrines, urinals, tanks and water-courses and the preparation of compost manure;

(b) the watering and lighting of such streets or any of them;

(c) the construction, establishment and maintenance of schools, hospitals and dispensaries and other institutions for the promotion of education or for the benefit of the public health, and of rest-houses, sarais, poor houses, markets, stalls, encamping grounds, pounds, and other works of public utility, and the control and administration of public institutions of any of these descriptions;

(d) grants-in-aid to schools, hospitals, dispensaries, poor-houses, leper-asylums and other educational or charitable institutions;

(e) the training of teachers and the establishment of scholarships;

(f) the giving of relief and the establishment and maintenance of relief works in time of famine or scarcity;

(g) the supply, storage and preservation from pollution of water for the use of men or animals;

(h) the planting and preservation of trees, and the establishment and maintenance of public parks and gardens;

(i) the taking of a census, the registration of births, marriages and deaths, public vaccination and any sanitary measure;

(j) the holding of fairs and industrial exhibitions;

(k) the preparation and maintenance of a record of rights in immoveable property;

(l) all acts and things which are likely to promote the safety, health, welfare or convenience of the inhabitants or expenditure whereon may be declared by the committee, with the sanction of the State Government to be an appropriate charge on the municipal fund."

73. Some of the services envisaged under Eleventh and Twelfth Schedules and the relevant provisions of the Municipal Act and the Panchayati Raj Act may appear to be meant for general public but those concerning the roads, bridges, streets, markets, water supply, sanitation are certainly meant to facilitate the free flow of trade and the petitioners, who bring the goods from outside the State into a local area or from one local area to another local area, avail these services. For providing these services, the local bodies are required to incur expenditure, a majority source of which was octroi and other similar levies. The State Government was bound to provide for alternative source for augmenting the revenue of the local bodies for utilisation for development of the local

areas and providing services including the trading facilities. This is precisely what has been done by levy of entry tax. Section 22 of the Entry Tax Act makes it obligatory for the State Government to distribute the tax among the local bodies for utilisation for the development of the local areas. Therefore, the impugned tax cannot but be termed as a compensatory tax and it does not come within the purview of the restriction contemplated by Article 301 of the Constitution. As a logical corollary to this conclusion, it must be held that the Entry Tax Act cannot be declared unconstitutional on account of non-compliance of Article 304 (b).

74. The argument of the learned counsel for the petitioners that the impugned levy is discriminatory and violative of Articles 14 and 304(a) of the Constitution is based on a misconceived assumption that the tax is limited to manufacturers. At the cost of repetition, it would be appropriate to mention that levy of tax under Section 3(1) of the Entry Tax Act is on entry of goods into a local area for consumption or use therein. Thus, the taxable event is on the entry of goods into a local area for consumption or use therein and not manufacture of a product. The manufacturer who brings raw material into the local area for consumption and produce goods, which are either sold in the State or transferred outside the State subsequently, are liable to pay the tax. Even non- manufacturer, who brings any goods into a local area for use therein, is liable to pay tax. Those bringing goods into a local area from one local area or outside the State are liable to pay tax in similar measure at the same rate. Therefore, Section 3 of the Entry Tax Act cannot be regarded as discriminatory and violative of Articles 14 and 304(a) of the Constitution.

75. The deductions envisaged by Section 5(1) or exemptions granted by the government by issuing notification

under Section 11 of the Entry Tax Act are also uniformly applicable to all those who are liable to pay tax, i.e. those bringing the goods from outside the State into a local area or from one local area to another local area. Therefore, on this count also, the entry tax cannot be regarded as discriminatory and violative of Article 304(a) of the Constitution.

76. Before parting with this aspect of the case, we may refer to the judgments relied upon by the learned counsel for the petitioners. In Firm A.T.B. Mehtab Majid and Co. v. State of Madras and another (supra), a Constitution Bench of the Supreme Court considered the validity of Rule 16(2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. The petitioner, who was a dealer in hides and skins, challenged the impugned rule on the ground that it had the effect of imposing higher rate of tax on tanned hides or skins imported from outside the State and sold within the State as compared to the tax imposed on hides or skins tanned and sold within the State. It was further submitted that hides or skins imported from outside the State after purchase in their raw condition and then tanned inside the State are also subjected to higher tax than hides or skins purchased in the raw condition within the State and tanned within the State. According to the petitioner, the levy of higher rate of tax on imported hides and skins was violative of Article 304(a) of the Constitution. Their Lordships of the Supreme Court referred to the views expressed by Subba Rao, J. in Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan (supra) and held the impugned levy to be discriminatory by making the following observations:

"It is therefore now well settled that taxing laws can be restrictions on trade, commerce and intercourse. They hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure

regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against Article 301 and will be valid only if it comes within the terms of Article 304(a).

Article 304(a) enables the Legislature of a State to make laws affecting trade, commerce and intercourse. It enables the imposition of taxes on goods from other States if similar goods in the State are subjected to similar taxes, so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from other States. This means that if the effect of the sales tax on tanned hides or skins imported from outside is that the latter becomes subject to a higher tax by the application of the proviso to sub-rule (2) of rule 16 of the Rules, then the tax is discriminatory and unconstitutional and must be struck down." (Underlining is ours).

77. In Andhra Steel Corporation v. CCT in Karnatka (supra), the Supreme Court applied the ratio of Firm A.T.B. Mehtab Majid and Co. v. State of Madras and another (supra) and held that Section 5(4) of the Karnataka Sales Tax Act, under which exemption was granted from payment of sales tax to finished goods manufactured out of locally purchased raw material while taxing sale of finished goods manufactured out of imported raw material, was discriminatory and violative of Article 304(a) of the Constitution.

78. In Shree Mahavir Oil Mills and another v. State of Jammu and Kashmir and others (supra), the exemption granted to local manufacturers/producers of edible oil from payment of sales tax under the Jammu & Kashmir General Sales Tax Act was declared violative of Articles 301 and 304 (a) of the Constitution on the ground that it was discriminatory qua those who were importing edible oil from

outside the State. The two-Judges Bench of the Supreme Court referred to Atiabari Tea Co. v. State of Assam (supra), Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan (supra) and Firm A.T.B.Mehtab Majid & Co. v. State of Madras and another (supra) and some other decisions and held as under:

"In our opinion, it is this: the States are certainly free to exercise the power to levy taxes on goods imported from other States/Union Territories but this freedom, or power, shall not be so exercised as to bring about a discrimination between the imported goods and the similar goods manufactured or produced in that State. The clause deals only with discrimination by means of taxation; it prohibits it. The prohibition cannot be extended beyond the power of taxation. It means in the immediate context that States are free to encourage and promote the establishment and growth of industries within their States by all such means as they think proper but they cannot, in that process subject the goods imported from other States to a discriminatory rate of taxation, i.e., a higher rate of sales tax vis-a-vis similar goods manufactured/ produced within that State and sold within that State. Prohibition is against discriminatory taxation by the States. It matters not how this discrimination is brought about. A limited exception has no doubt been carved out in Video Electronics (1990) 77 STC 82 (SC): (1990) 3 SCC 87, but, as indicated hereinbefore, that exception cannot be enlarged lest it eat up the main provision. So far as the present case is concerned, it does not fall within the limited exception aforesaid; it falls within the ratio of Firm A.T.B. Mehtab Majid (1963) 14 STC 355 (SC): (1963) Suppl. 2 SCR 435 and the other cases following it. It must be held that by exempting unconditionally the edible oil produced within the State of Jammu and Kashmir altogether from sales tax, even if it is for a period of ten years, while subjecting the edible oil produced

in other States to sales tax at eight per cent, the State of Jammu and Kashmir has brought about discrimination by taxation prohibited by Article 304(a) of the Constitution."

79. In Anand Commercial Agencies v. Commercial Tax Officer, Hyderabad (supra), the levy of higher rate of tax on groundnut oil brought from other State as compared to the groundnut oil extracted from groundnut already taxed in the State was declared discriminatory and violative of Articles 301 and 304 of the Constitution.

80. In State of U.P. v. Laxmi Paper Mart (supra), the exemption granted by the State of U.P. to the exercise books of paper purchased within Uttar Pradesh while subjecting other exercise books to tax under Uttar Pradesh Sales Tax Act was declared violative of Article 304(a) by applying the ratio of Firm A.T.B.Mehtab Majid and Co. v. State of Madras (supra) and Shree Mahavir Oil Mills v. State of Jammu and Kashmir (supra).

81. In Weston Electronics and another v. State of Gujarat and another (supra), the levy of different rates of sales tax between electronic goods imported into the State of Gujarat and goods manufactured within that State was declared violative of Articles 301 and 304(a) of the Constitution.

82. In our opinion, the ratio of the above noted cases does not have any bearing on the issue before us. In those cases, the Supreme Court had considered the constitutionality of the provisions under which lower rates of sales tax had been imposed on the goods manufactured from the raw material procured from within the State as compared to the tax levied on the goods imported from other States or the levy of different sales tax on the imported goods vis-a-vis locally manufactured goods. The Court held that the levy was discriminatory and violative of Articles 301 and/or 304(a) of the Constitution. A careful reading of the ratio of Firm A.T.B.Mehtab Majid and Co. v. State of Madras and another

> (supra) which appears to be the basis of all subsequent decisions, shows that their Lordships were clearly of the view that the sales tax in question was not compensatory tax or a regulatory measure. This is clearly borne out from the portion, which we have underlined above while dealing with that judgment. Thus, the aforesaid judgments cannot be relied upon for striking down the entry tax."

6. The Constitution Bench of the Hon'ble Supreme Court considered the issue of parameters to be applied for determining whether tax was compensatory, while considering the issue referred about correctness of the view taken in **Bhagatram** and **Bihar Chamber of Commerce's** cases (supra) and observed:-

> **"**16**.** To sum up: the pre-1995 decisions held that an exaction to reimburse/ recompense the State the cost of an existing facility made available to the traders or the cost of a specific facility planned to be provided to the traders is compensatory tax and that it is implicit in such a levy that it must, more or less, be commensurate with the cost of the service or facility. Those decisions emphasised that the imposition of tax must be with the definite purpose of meeting the expenses on account of providing or adding to the trading facilities either immediately or in future, provided the quantum of tax is based on a reasonable relation to the actual or projected expenditure on the cost of the service or facility.

However, the post-1995 decisions in *Bhagatram case* (***Jindal Strips Ltd. (1)*** ***v.*** ***State of Haryana*** (2003) 8 SCC 60 and in *Bihar Chamber of Commerce* (***Sharma Transpport*** ***v.*** ***Govt. of A.P.*** now say that even if the purpose of imposition of the tax is not merely to confer a special advantage on the traders but to benefit the public in general including the traders, that levy can still be considered to be compensatory. According to this view, an indirect or incidental benefit to traders by reason of stepping up the developmental activities in various local areas of the State can be brought within the concept of compensatory tax, the nexus between the tax known as compensatory tax and the trading facilities not being necessarily either direct or specific.

xx xx xx xx

37**.** The concept of compensatory tax is not there in the Constitution but is judicially evolved in *Automobile Transport* ***(Bhagatram Rajeevkumar*** ***v.*** ***CST*** 1995 Supp (1) SCC 673 as a part of regulatory charge. Consequently, we have to go into concepts and doctrines of taxing powers vis--vis regulatory powers, particularly when the concept of compensatory tax was judicially crafted as an exception to Article 301 in *Automobile Transport* .

Difference between exercise of Taxing and Regulatory Power

38**.** In the generic sense, tax, toll, subsidies, etc. are manifestations of the exercise of the taxing power. The primary purpose of a taxing statute is the collection of revenue. On the other hand, regulation extends to administrative acts which produces regulative effects on trade and commerce. The difficulty arises because taxation is also used as a measure of regulation. There is a working test to decide whether the law impugned is the result of the exercise of regulatory power or whether it is the product of the exercise of the taxing power. If the impugned law seeks to control the conditions under which an activity like trade is to take place then such law is regulatory. Payment for regulation is different from payment for revenue. If the impugned taxing or non-taxing law chooses an activity, say, movement of trade and commerce as the criterion of its operation and if the effect of the operation of such a law is to impede the activity, then the law is a restriction under Article 301. However, if the law enacted is to enforce discipline or conduct under which the trade has to perform or if the payment is for regulation of conditions or incidents of trade or manufacture then the levy is regulatory. This is the way of reconciling the concept of compensatory tax with the scheme of

Articles 301, 302 and 304. For example, for installation of pipeline carrying gas from Gujarat to Rajasthan, which passes through M.P., a fee charged to provide security to the pipeline will come in the category of manifestation of regulatory power. However, a tax levied on sale or purchase of gas which flows from that very pipe is a manifestation of exercise of the taxing power. This example indicates the difference between taxing and regulatory powers (see *Essays in Taxation* by Seligman).

Difference between "a tax", "a fee" and "a CompensatoryTax"
Parameters of Compensatory Tax"

"39**.** As stated above, in order to lay down the parameters of a compensatory tax, we must know the concept of taxing power.

40. Tax is levied as a part of common burden. The basis of a tax is the ability or the capacity of the taxpayer to pay. The principle behind the levy of a tax is the principle of ability or capacity. In the case of a tax, there is no identification of a specific benefit and even if such identification is there, it is not capable of direct measurement. In the case of a tax, a particular advantage, if it exists at all, is incidental to the State's action. It is assessed on certain elements of business, such as

manufacture, purchase, sale, consumption, use, capital, etc. but its payment is not a condition precedent. It is not a term or condition of licence. A fee is generally a term of a licence. A tax is a payment where the special benefit, if any, is converted into common burden.

41. On the other hand, a fee is based on the "principle of equivalence". This principle is the converse of the "principle of ability" to pay. In the case of a fee or compensatory tax, the "principle of equivalence" applies. The basis of a fee or a compensatory tax is the same. The main basis of a fee or a compensatory tax is the quantifiable and measurable benefit. In the case of a tax, even if there is any benefit, the same is incidental to the government action and even if such benefit results from the government action, the same is not measurable. Under the principle of equivalence, as applicable to a fee or a compensatory tax, there is an indication of a quantifiable data, namely, a benefit which is measurable.

42. A tax can be progressive. However, a fee or a compensatory tax has to be broadly proportional and not progressive. In the principle of equivalence, which is the foundation of a compensatory tax as well as a fee, the value of the quantifiable benefit is represented by the costs incurred in procuring the facility/services, which costs in turn become the basis of

reimbursement/recompense for the provider of the services/facilities. Compensatory tax is based on the principle of "pay for the value". It is a sub-class of a "a fee". From the point of view of the Government, a compensatory tax is a charge for offering trading facilities. It adds to the value of trade and commerce which does not happen in the case of a tax as such. A tax may be progressive or proportional to income, property, expenditure or any other test of ability or capacity (principle of ability). Taxes may be progressive rather than proportional. Compensatory taxes, like fees, are always proportional to benefits. They are based on the principle of equivalence. However, a compensatory tax is levied on an individual as a member of a class, whereas a fee is levied on an individual as such. If one keeps in mind the "principle of ability" vis-à-vis the "principle of equivalence", then the difference between a tax on one hand and a fee or a compensatory ax on the other hand can be easily spelt out. Ability or capacity to pay is measurable by property or rental value. Local rates are often charged according to the ability to pay. Reimbursement or recompense are the closest equivalence to the cost incurred by the provider of the services/facilities. The theory of compensatory tax is that it rests upon the principle that if the Government by some positive action confers

upon individual(s), a particular measurable advantage, it is only fair to the community at large that the beneficiary shall pay for it. The basic difference between a tax on one hand and a fee/compensatory tax on the other hand is that the former is based on the concept of burden whereas compensatory tax/fee is based on the concept of recompense/reimbursement. For a tax to be compensatory, there must be some link between the quantum of tax and the facility/services. Every benefit is measured in terms of cost which ahs to be reimbursed by compensatory tax or in the form of compensatory tax. In other words, compensatory tax is a recompense/reimbursement.

43. In the context of article 301, therefore, compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred by some special advantage to trade, commerce and intercourse. It may incidentally bring in net revenue to the Government but that circumstance is not an essential ingredient of compensatory tax.

44. Since compensatory tax is a judicially evolved concept, understanding of the concept, as discussed above, indicates its parameters."

45. To sum up, the basis of every levy is the controlling factor. In the case of "a tax", the levy is a part of common burden based on the principle

of ability or capacity to pay. In the case of "a fee", the basis is the special benefit to the payer (individual as such) based on the principle of equivalence. When the tax is imposed as a part of regulation or as a part of regulatory measure, its basis shifts from the concept of "burden" to the concept of measurable/quantifiable benefit and then it becomes "a compensatory tax" and its payment is then not for revenue but as reimbursement/recompense to the service/facility provider. It is then a tax on recompense. Compensatory tax is by nature hybrid but it is more closer to fees than to tax as both fees and compensatory taxes are based on the principle of equivalence and on the basis of reimbursement/recompense. If the impugned law chooses an activity like trade and commerce as the criterion of its operation and if the effect of the operation of the enactment is to impede trade and commerce then article 301 is violated.

Burden on the State

46. Applying the above tests/parameters, whenever a law is impugned as violative of Article 301 of the Constitution, the Court has to see whether the impugned enactment facially or patently indicates quantifiable data on the basis of which the compensatory tax is sought to be levied. The Act must facially indicate the benefit which is quantifiable or measurable. It must

broadly indicate proportionality to the quantifiable benefit. If the provisions are ambiguous or even if the act does not indicate facially the quantifiable benefit, the burden will be on the state as a service/facility provider to show by placing the material before the Court, that the payment of compensatory tax is a reimbursement/recompense for the quantifiable/measurable benefit provided or to be provided to its payer(s). As soon as it is shown that the Act invades freedom of trade it is necessary to enquire whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in public interest within the meaning of Article 304(b) (see para 35 (of AIR) of the decision in Khyerbari Tea Co. Limited v. State of Assam, AIR 1964 SC 925.

a. **Scope of articles 301, 302 and 304 vis-à-vis compensatory Tax.**

47. As stated above, taxing laws are not excluded from the operation of Article 301, which means that tax laws can and do amount to restrictions on the freedom guaranteed to trade under part XIII of the Constitution. This principle is well settled in Atiabari Tea Co., AIR 1961 SC 232. it is equally important to note that in Atiabari Tea Co., AIR 1961 SC 232, the Supreme Court propounded the doctrine of “direct and immediate effect”. Therefore, whenever a law is challenged on the

ground of violation of article 301, the Court has not only to examine the pith and substance of the levy but in addition thereto, the Court has to see the effect and the operation of the impugned law on inter-State trade and commerce as well as intra-State trade and commerce.

48. when any legislation, whether it would be a taxation law or a non-taxation law, is challenged before the Court as violating Article 301, the first question to be asked is: what is the scope of the operation of the law? Whether it has chosen an activity like movement of trade, commerce and intercourse throughout India, as the criterion of its operation? If yes, the next question is: what is the effect of operation of the law on the freedom guaranteed under Article 301? If the effect is to facilitate free flow of trade and commerce then it is regulation and if it is to impede or burden the activity, then the law is a restraint. After finding the law to be a restraint/restriction one has to see whether the impugned law is enacted by parliament or the State Legislature. Clause (b) of Article 304 confers a power upon the state Legislature similar to that conferred upon parliament by article 302 subject to the following differences:

(a) While the power of Parliament under Article 302 is subject to the prohibition of preference and discrimination decreed by Article 303(1) unless Parliament makes the

declaration under article 303(2), the state power contained in article 304(b) is made expressly free from the prohibition contained in Article 303(1) because the opening words of Article 304 contain a non obstante clause both to article 301 and Article 303.

(b) While parliament's power to impose restrictions under article 302 is not subject to the requirement of reasonableness, the power of the State to impose restrictions under article 304 is subject to the condition that they are reasonable.

(c) An additional requisite for the exercise of the power under Article 304(b) by the State Legislature is that previous Presidential sanction is required for such legislation.

7. After the judgment of the Constitution Bench dated 13.4.2006 reported in **Jindal Stainless Limited (2) and another v. State of Haryana and others,** (2006) 7 SCC 241, the matter was placed before a Division Bench of the Hon'ble Supreme Court and while adjourning the matter, the following directions were issued in order dated 14.7.2006 (2006 (7) SCC 271):-

"Since relevant data do not appear to have been placed before the High Courts, we permit the parties to place them in the writ petitions concerned

> within two months. The High Courts concerned shall deal with the basic issue as to whether the impugned levy was compensatory in nature. The High Courts are requested to decide the aforesaid issue within five months from the date of receipt of our order. The judgment in the respective cases shall be placed on record by the parties concerned within a month from the date of the decision in each case pursuance to our direction."

8. We have heard learned counsel for the parties. Shri A.K. Ganguly, Senior Advocate led the arguments on behalf of the petitioners and other learned counsel for the petitioners, in substance, supported the said arguments. Shri Rakesh Dwivedi, and Shri Uday Lalit, Senior Advocates led the arguments on behalf of the State.

Data brought on record after the orders of Hon'ble the Supreme Court:

9. Learned counsel for the State placed on record a copy of The Haryana Local Area Development Tax (Amendment) Ordinance, 2007, published in the Government gazette dated 01.03.2007. Learned counsel for the petitioners filed an application for amending the writ petition to challenge the said

ordinance. We allowed the parties to make their respective submissions with reference to the said Ordinance.

10. Two affidavits have been filed on be half of the State of Haryana - affidavit dated 14.11.2006 and affidavit dated 19.02.2007, extracts from which are as under:-

Affidavit dated 14.11.2006:-

> "7. That, as per the information received from Finance Department, Haryana, tax amounting to Rs.910.75 crores collected under the LADT Act during the financial years2000-01, 2001-02, 2002-03, 2003-04, 2004-05 has been allocated to (a) Panchayati Raj Institution and (b) Urban Local Bodies in accordance with the directions dated 28.12.2005 of the High Powered Committee headed by Chief Secretary, Haryana. A copy of the Finance Department letter dated 5.7.2006 is attached as Annexure R-II.
>
> 8. That a perusal of the Minutes of the Meeting (attached as Annexure R-III) of the High Powered Committee would show that there is a direction – clear and unambiguous – that LADT funds are to be utilized through Local Bodies for development and maintenance of infrastructure facilities useful for free flow of trade and commerce. The minutes further show that "as the local bodies do not have sufficient infrastructure, they can get the funds utilized through different Government Departments

depending upon the need of the area. The sectors to be included would be roads, electricity and drinking water etc. in conformity with the spirit of Section 22 of LADT Act."

9. That a report regarding utilization of LADT funds has been received from Financial Commissioner and Principal Secretary to Govt., Haryana, Development and Panchayats Department vide memo. No.PRA-1-2006/48876, dated 11.9.2006 which shows that 1170.16 lacs. during 2003-04, 2250 lacs during 2004-05, 103.80 crores during 2005-06 were released to the Panchayati Raj Institutions. The Information shows that the funds aforementioned were actually required for developing and maintaining infrastructure facilities useful for free flow of trade and commerce and that the said funds released under LADT scheme have been actually utilized for construction / repair of roads in rural areas and for strengthening infrastructure to facilitate free flow and commerce in rural area. This memo points out in unmistakable terms that link roads / village links being developed and maintained by Panchayati Raj Institutions will infact be facilitating movement to and fro from industries in rural areas. This memo. clarifies that the funds are still not sufficient for over all development of the facilities being provided. A copy of the memo. dated 11.9.2006 is attached as Annexure R-IV.

10. That a memo. (No.DUD/TA/2006/50172, dated 4.9.2006) received from Director, Urban Development, Haryana, Chandigarh shows receipt of LADT funds by Urban Development department during 2005-06 and 2006-07 and their utilization for the improvement of civic amenities in urban areas to facilitate free flow of trade and commerce in Haryana. A copy of the memo dated 4.9.2006 is attached as Annexure R-V perusal whereof would show that receipt of LADT funds during the financial years 2005-06 and 2006-07 is of the order of Rs.11,580.00 and Rs.6,482.00 lakh respectively. The total amount utilized during the years 2005-06 and 2006-07 comes to Rs.6660.00 lakh. The balance Rs.6235.66+5166.34 = Rs.11402 lakh would be utilized upto 31.12.2006 for facilitating free flow of trade and commerce.

11. That it is pertinent to submit that as per memo. No.50172, dated 4.9.06 (Annexure R-V) the amount released is not in excess of the requirement of the department to provide facilities in municipalities for free flow of trade and commerce.

12. That the Urban Development Department is considering finalizing a proposal entailing and estimated expenditure of Rs.586.88 crores for development work in Urban Local Bodies, Haryana for facilitating free flow of trade and commerce. A copy of the aforesaid proposal showing necessary

details regarding projects and expenditure is enclosed as Annexure R-VI.

13. That the State Government is actively considering setting up a Local Area Development Board which will be a monitoring agency to ensure that the funds generated under the LADT Act, 2000 are utilized solely for the purpose of facilitating free flow of trade and commerce.

14. That it has been clarified by the Urban Development Department, Haryana to utilizing agencies that the funds are not to be utilized for construction/ maintenance of community centers and parks. (Annexure R-VII).

15. That, lastly it is reiterated that the funds collected under the LADT Act, 2000 are being utilized for the purposes envisaged in the amended Section 22 of the Act ibid and that the tax is nothing but a recompense for the services being provided by the respondent-State."

Affidavit dated 19.2.2007:-

"7. That before the judgment of the Supreme Court in the case of Jindal Stainless, the law declared by the Supreme Court was that "some connection" between the tax collected and the benefit or facility to the payer of the tax would be sufficient to sustain the tax. It is on this basis that this Hon'ble Court

earlier upheld that validity of the Act. Consequently, the allocations were earlier being made on this legal basis. However, after the Constitution Bench judgement dated 13.4.2006 of the Supreme Court in Jindal Stainless case, the concept of compensatory tax has been explained and the theory of "some connection" has been discarded and overruled. In this back drop, the State Govt. would implement the concept of compensatory tax with regard to Entry Tax as explained by Jindal Stainless and the state is committed to ensure that the LADT funds collected are expended substantially in developments which facilitate the trade and commerce of the payer of the tax either individually or as a class. In this context, the aberrations which may have occurred in the past on account of the earlier judgment of the Supreme Court would be rectified in due course.

8. That in the aforesaid context, it is notable that the Haryana Local Area Development Tax Act, 2000 was gazetted on 19.9.2000. Soon thereafter, writ petitions had been filed in the Hon'ble High Court. This Hon'ble Court was pleased to issue Interim Order directing that the tax would not be recovered by coercive methods.

9. The aforesaid interim order continued up to 21.2.2001 when the final judgment by the Hon'ble Court was delivered. Subsequently, the petitioners filed a Special Leave Petition in the Supreme Court

and sought an interim order of stay with respect to collection of tax under the Act. However, the Hon'ble Supreme Court passed an Interim Order directing the petitioners to pay the tax, initially in 4 installments and later modifying the interim order to permit six quarterly installments. In this view of the matter, the tax could be collected only installments during the year 2002 and the State could recover the entire tax due by the middle of 2003. It may be mentioned that in the year 2000-01 a sum of R.19.53 Crores only was collected in the State, and in the year 2001-02 Rs.128.85 Crores were collected. In the year 2002-03 a sum of Rs.245.63 Crores and in the year 2003-04 a sum of Rs.243.79 Crores were collected. In the subsequent years, some more collections were made. The data establishes that in the initial two years, the State was unable to collect the Entry Tax in accordance with law. In the circumstances, the expenditure could be planned properly only from the year 2002 onwards. The other notable aspect is that the utilization for the purposes of development under the Act is an ongoing process and not a one time or annual phenomenon. Hence, it would be open and permissible to the State to replan the expenditure and utilization of LADT fund for development purpose under the Act in accordance with the recent judgment of the Supreme Court in Jindal Stainless.

10. That as a measure of rectification and decision to implement Jindal Stainless judgment of the Hon'ble Supreme Court, the State Government is actively considering the proposal for development works in the Urban Local Bodies in Haryana particularly, Faridabad, Panchkula, Ambala, Sirsa & other Urban Local Bodies. One such proposal is estimated at Rs.541.27 Crores and it seeks to implement among other things Municipal Solid Waste Management. A true copy of the proposal is annexed as Annexure AA-2. There is yet another proposal under consideration of the State Government and the same has been received from Municipal Corporation, Faridabad for providing infrastructure in the form of Road, drainage and sewerage. It is estimated at Rs.997.12 Crs. A true copy of the proposal is annexed as Annexure AA-3. Part of the later proposal would be implemented with the aid of Central Government.

11. That the Municipal Solid Waste Management and handling is a mandatory requirement under the environment (Protection) Act 1986 and the Municipal Sold Wastes (Management & Handling) Rules, 2000 made thereunder. A copy of the rules is enclosed as Annexure AA-4. vide Rule 4 every Municipal Authority is made responsible for the implementation of the provisions and for infrastructure developments for collection, storage, segregation, transportation, processing and disposal

of Municipal solid wastages. As per rule 3(xv), Municipal Solid Wastages is defined to include commercial and residential wastages generated in a Municipal area in either sold or semi-solid form including bio-medical wastages. In view of Rule 5, the State Govt. is overall responsible for implementation of the rules. It is a known fact that big industries and refineries require large-scale employment of staff and officials and also necessitate construction of colonies for residential purposes or alternatively, generate necessity of private residence taken on rent by the employees and staff of these establishments. Unless appropriate sewerage, drainage and solid waste management is implemented by the local bodies and the state, neither the town would be leviable nor the industry could be carried on. This, therefore, constitutes a direct, immediate and continuous benefit or facility to the industry and the flow of trade and commerce would be impossible without such infrastructural facilities. The big industries and refineries also generate commercial wastes. Additionally these benefits are localized within and around the area of the industries and are therefore proximately connected locationally also.

12. That in so far as construction of roads, bridges and culverts are concerned, they constitute a single integrated statewide network connecting the 20 Districts in the state of Haryana as well as the

various urban Local Bodies and Panchayats. This integrated and interconnected infrastructure facility constitutes the spine for free flow of trade and commerce throughout the State and even outside. It constitutes a direct immediate benefit to various industries in the State of Haryana which are paying Entry Taxes notwithstanding that they are used by common people also. In view of the law declared by the Supreme Court, the facilities can be provided as a class also. Thus considered all the payers of Entry Tax are utilizing the statewide integrated network of roads, bridges and culverts as a class and therefore the utilization of LADT funds with respect to these benefits in the various local areas of the state would constitute the provision of facility to the payers of tax as a class."

11. The petitioners have filed affidavits dated 04.12.2006 and 02.03.2007, wherein apart from pointing out that the petitioner-company is not individually given any service, it has been argued that the services envisaged in the affidavits of the State did not make the impugned levy compensatory.

12. Relevant statutory provisions of the Act are as under:-

"Preamble and Sections 2(5),(9),(12),(13), (14),(15), (21), (26), 3, 5, 11 and 22.

To provide for levy and collection of tax on the entry of goods into the local areas of the State of Haryana for consumption for (sic) use therein and matters incidental thereto and connected therewith.

2. In this Act, unless the context otherwise requires,-

(5) "bring goods into a local area" means causing the entry of goods into a local area by bringing them inside the local area or causing the goods to be brought inside the local area from any place outside the local area.

(9) "entry of goods into a local area" means taking or bringing goods into a local area from any place outside the State or from any place inside any other local area in the State;

(12) "gross turnover" used in relation to an importer with reference to a period of time means the sum of value of goods which the importer brings or receives on the entry of such goods into a local area during the given period;

(13) "importer" means any person who, in the course of business, whether on his own account or on account of a principal or any other person, brings any goods into or receives or is entitled to receive any goods on their entry into a local area and includes a casual importer;

(14) "local area" means an area within the limits of a Municipal Corporation established under the Haryana Municipal Corporation Act, 1994

(Haryana Act 16 of 1994), or a municipality established under the Haryana Municipal Act, 1973 (Haryana Act 24 of 1973), or a Town Board or a Cantonment Board established under the Cantonment Act, 1924 (Central Act 2 of 1924), or a Zila Parishad established under the Haryana Panchayati Raj Act, 1994 (Haryana Act No.11 of 1994), or any other local authority constituted or continued under any law for the time being in force;

(15) "manufacturer" means a person who carries on business of processing or manufacturing of goods, whether wholly or partly;

(21) "receive any goods" means to take delivery or possession of any goods, whether actual or constructive, or cause the goods to be received by any other person;

(26) "tax" means the tax leviable under this Act;

3. (1) There shall be levied and collected a tax on entry into a local area, of all goods except those specified in Schedule A, for consumption or use therein, at such rates not exceeding four per cent of the value of the goods, as may, by notification, be specified by the State Government and different dates and different rates may be specified in respect of different goods or different classes of goods or for different local areas.

(2) The tax levied under sub-section (1) shall be paid by the importer;

Provided that an importer shall not be liable to pay tax so long as the aggregate value of taxable goods he brings into or receives on their entry into any local area does not, in a year exceed ten lakh rupees or such other sum as the State Government may, by notification, specify;

Provided further that an importer who has once become liable to pay tax under this Act shall continue to be so liable until the expiry of three consecutive years during each of which the aggregate value of any taxable goods he brings into or receives on their entry into any local area does not exceed the amount specified in the first proviso to this sub-section.

Explanation: Where the goods are received on its entry into a local area by a person other than an importer, the importer, if any, who further receives the goods from such person shall be deemed to have received the goods on entry into the local area.

(3) The tax shall be levied, assessed and collected in such manner and in such instalments, if any, as may be prescribed.

5.(1) In calculating the turnover liable to tax for a period, an importer may deduct from his gross turnover during that period-

(a) the value of goods specified in Schedule `A';

(b) the value of goods which have, without use or consumption, been delivered outside the local area;

(c) the value of goods which have been subjected to tax once under this Act, either as such or in in some other form;

(d) the value of goods on which sales tax has been paid or has become payable to the State;

(e) the value of plant, machinery, equipment and tools, brought or received on lease;

(f) the value of goods left in the stock, whether as such or in different form, lying with him in the local area, except when the certificate of registration issued under this Act is cancelled;

Provided that the value of goods deducted under this clause shall, except when the certificate of registration issued under this Act is cancelled, form part of the turnover for the period immediately succeeding;

Provided further that the value of plant, machinery, equipment and tools, if forming part of the turnover, may form part of the closing stock, if capitalised; and

(g) the value of such other goods as may be prescribed;

Explanation: For the purpose of this sub-section deductions of value of only such goods shall be admissible which forms part of gross turnover of the importer and if value of certain

goods have been deducted under one clause then it shall not be deducted under any other clause.

(2) The deductions claimed under sub-section (1) of this Section shall be subject to production of such proof in such form and in such manner as may be prescribed. The assessing authority may ask for any relevant evidence to satisfy itself about the genuineness and correctness of the proof furnished.

11. (1) The State Government may, if in its opinion it is necessary in public interest so to do, by notification and subject to such restrictions and conditions and for such period as may be specified in the notification, exempt or reduce the tax payable by any class of importers under this Act.

(2) Where any restriction or condition specified under a notification issued under sub-section (1) is contravened or is not observed by an importer or where a declaration, if any, specified under the said notification for observance of any condition or restriction imposed therein, is found to be wrong, then such importer shall, in addition to tax calculated at the full rate, notified under sub-section (1) of section 3, on the value of such goods in respect of which such contravention or non-observance has taken place or a wrong declaration has been furnished, be liable to pay interest in terms of sub-section (5) of Section 6 of this Act.

> Provided that before taking action under this sub-section, the importer shall be given a reasonable opportunity of being heard.
>
> 22. The tax collected under this Act shall be distributed by the State Government amongst the local bodies to be utilised for the development of local areas."

13. An Explanation was added to Section 22 on 30.9.2003 which reads as under:

> "Explanation – In this section "the development of local areas" means developing and maintaining infrastructure facilities useful for free flow of trade and commerce."

14. Relevant provisions of The Haryana Local Area Development Tax (Amendment) Ordinance, 2007 are as under:-

> "**3.** For section 22 of the principal Act, the following section shall be substituted and shall be deemed to have been substituted with effect from 5th May, 2000, namely:-
>
> "**22 Utilisation of proceeds of tax.-** The tax collected under this Act shall be utilized by the State Government through the local bodies in such manner that a substantial portion of the tax collected, not less than sixty percent is utilized

for development facilitating free flow of trade and commerce of the payers of the tax invidually or as a class.

Explanation.- In this section "development facilitating free flow of trade and commerce" means developing and maintaining infrastructure facilities facilitating the free flow of trade and commerce such as roads, bridges, culverts, sewerage, drainage, sanitation, waste management, electricity, drinking water and other infrastructural facilities."

4. After Section 22 of the principal Act, the following section shall be inserted, namely:-

"22A. Constitution of Board and its functions.- (1) There shall be a Board consisting of a Chairman and following ex-officio members:-

(a) Chief Minister, Haryana : Chairman

(b) Chief Secretary, Haryana : ex-officio member

(c) Finance Secretary, Haryana : ex-officio member

(d)Financial Commissioner and Secretary to Government, Haryana, Excise and Taxation Department : ex-officio member

(e)Financial Commissioner and Secretary to Government, Haryana, Development and Panchayats Department : ex-officio member

(f)Commissioner, Urban Local : ex-officio member

(g)Excise and Taxation Commissioner Haryana: Member Secretary

(h) Additional Excise and Taxation Commissioner/Joint Excise and Taxation Commissioner, Haryana : Chief Executive Officer.

(2) The Headquarter of the Board shall be at Chandigarh.

(3) The Board shall perform the following functions:-

(i) It shall ensure balanced development of the local areas falling within the domain of the urban as well as rural local bodies.

(ii) It shall identify the areas which require immediate development/ maintenance of infrastructure facilities out of proceeds of tax.

(iii) It shall accordingly recommend allotment of proceeds of tax for developing and maintaining infrastructure facilitries like roads, bridges, culverts, sewerage, drainage, sanitation, waste management, electricity, drinking water and other infrastructural facilities.

(iv) It shall recommend changes in the rate of tax in order to keep the levy as per the guidelines issued in this behalf from time to time.

(v) It shall ensure that the proceeds of tax collected under this Act are not much more than the amount actually required for development of local areas."

Submissions on behalf of the Petitioners:

15. Shri Ganguly submitted that the impugned Act does not meet the facial test laid down in para 46 of the Constitution Bench judgment in **Jindal Stainless Limited (2),** as no quantifiable data, on the basis of which the tax was sought to be levied, was indicated in the Act. The Act did not indicate quantifiable or measurable benefit to the payers of the tax. Section 22 of the Act provides for distribution of the tax collected amongst the local bodies for the development of local areas, which did not in any manner amount to giving of any measurable

advantage to the payers of the tax in terms of the parameters of compensatory tax laid down in paras 40 to 44 of the judgment in **Jindal Stainless Limited (2)**. Explanation added to Section 22, as published in notification dated 30.09.2003 to the effect that "the development of local areas" meant developing and maintaining infrastructure facilities useful for free flow of trade and commerce with a view to meet the observations of the referring Bench in the order dated 26.09.2003 in **Jindal Stripe Limited (1),** did not make any qualitative difference. The Ordinance dated Ist March, 2007 has been issued by utilizing the time taken by the State to file a further affidavit which itself was unfair. In the said Ordinance also, only change effected was that Section 22-A has been added providing for setting up a Board headed by the Chief Minister for balanced development of local areas. Other change effected is of substituting Section 22 by a new Section providing that the tax collected shall be utilized in such a manner that a substantial portion of the tax collected, not less than 60%, is utilized for development facilities facilitating free flow of trade and commerce of the payers of the tax individually or as a class. The explanation is to the effect that "development facilitating free flow of trade and commerce" mean developing and maintaining infrastructure facilities facilitating the

free flow of trade and commerce such as roads, bridges, culverts, sewerage, drainage, sanitation, waste management, electricity, drinking water and other infrastructural facilities.

It was not explained as to what will happen to the 40%. In absence of any specific details or any relevant mechanism, provision for spending the tax collected on drainage, sanitation, waste-management, electricity, water, culverts, bridges, roads etc. was not enough to hold that the parameters of the compensatory tax were met. Development of the State or of the local areas had to be carried out from the general revenue of the State and not out of the compensatory tax. If compensatory tax is to be used for development of the State or the local areas, the distinction between tax collected by way of general revenue and compensatory tax will be irrelevant and proviso to Article 304(b) of the Constitution will be meaningless. It was also submitted that apart from raising general revenue, compensatory taxes were also already being levied under various statutes to meet the cost of development including construction of roads, bridges etc. By way of instance, reference was made to Punjab Motor Vehicles Taxation Act, 1924, Punjab Passengers and Goods Taxation Act, 1952, Punjab Agricultural Produce Market Act, 1961 and the Haryana Rural Development Fund Act, 1983.

Reference was also made to the provisions of the Act providing for ad valorem levy of tax deductions out of turnover under Section 5, provision for exemption under Section 11 to submit that the tax was intended to be levied for raising of revenue in circumstances where sales tax was not payable by the manufacturers, getting raw material from outside the State and selling their products outside the State after transferring the finished products to their branches. It was submitted that the tax was not local area specific and tax collected from any local area was allowed to be spent in any other local area on general developmental activities. Learned counsel also referred to two affidavits filed on behalf of the State, purporting to give data justifying the character of tax as compensatory tax. He pointed out that as per details of the said affidavits, a sum of Rs.910.74 crores was collected for the years 2000-01 to 2004-05 while utilization was of the amount of Rs.154.20 crores, which was 17% of the total collection. He further pointed out that the stand of the State even in para 2 of the original affidavit filed in reply to the writ petition was that the tax was being collected to compensate local bodies for the octroi collection which had been stopped and to curb evasion of sales tax. The character of tax remained that of general tax for generation of revenue for the

development of the State and the same could not in any manner be held to be compensatory tax. The data placed on record on behalf of the State does not in any manner discharge burden on the State as per para 46 of the judgment of the Hon'ble Supreme Court in **Jindal Stainless Limited (2).**

16. Though learned counsel for the petitioners also pointed out that in individual cases, no facilities were being provided, we are of the view that the said issue is not relevant as individual service is not an essential pre-requisite of a compensatory tax. What is envisaged is services which may facilitate trade and commerce - not necessarily any individual -specific services. Arguments with regard to individual services need not, thus, be individually gone into.

17. Learned counsel for the petitioners submitted that the view taken in ***Bhagat Ram Raeev Kumar's*** case *(Supra)* that if there is some link between tax and the facilities extended, directly or indirectly, the tax will be compensatory and handing over of revenue collected to local bodies to provide municipal services efficiently, would help free flow of trade, has not been approved by the Constitution Bench. Similarly, the view taken in ***Bihar Chamber of Commerce's*** case *(supra)* that management of roads,

water, drainage and markets etc. justified recovery of entry tax, had also not been approved by the Constitution Bench.

Judgments of other High Courts:-

18. Learned counsel for the petitioners also relied upon judgments of High Courts of Kerala, Allahabad, Patna, Gauhati and Jharkhand rendered in the light of judgment of the Hon'ble Supreme Court in **Jindal (3)**.

19. The Kerala High Court in its judgment dated 18.12.2006 in ***M/s India Gateway Terminal (Pvt. Ltd. V. Intelligence Officer and another*** (W.A. No.2267 of 2005 (B), dealt with the question of validity of Kerala Tax on Entry of Goods into Local Areas Act, 1994 in the context of directions of the Hon'ble Supreme Court in **Jindal Stainless Limited (3) and another v. State of Haryana and others**, (2006) 7 SCC 271. The said provisions had been earlier upheld by a Division bench of the High Court in ***Rajan v. State of Kerala,*** .(1995) 2 KLT 369. A different view was, however, taken in a later judgment in ***Father William Fernandez v. State of Kerala & others,*** 115 STC 591. On behalf of the State, affidavit was filed showing the amount collected from entry tax and capital expenditure on roads and bridges. The Court held that the Act did not indicate any

benefit which was either quantifiable or measurable and, thus, compensatory character of tax was not self-evident from the Act. It was further held that the Act was for the purpose of augmenting general revenue. Maintenance of roads, providing of bridges etc. could not be held to be compensatory to meet outlay incurred for special advantage to trade, commerce and intercourse. The facilities were incidental. Expenses on roads, bridges were met from the general fund of the revenue and the said facilities were enjoyed not only by the persons bringing notified goods subjected to entry tax but also others. There is no nexus of tax with the utilization of services. Finally, it was concluded as under:-

> "22. We, therefore, hold that the levy of entry tax on goods imported from other States to the State of Kerala and from abroad is not compensatory in nature since the State Government could not discharge its burden by placing materials before Court that payment of levy of entry tax is reimbursement / recompense for the quantifiable/measurable benefit provided or to be provided to the petitioners. The impugned Act imposing entry tax cannot be said to be specifically meant for facilitating trade, commerce and intercourse, but is raised for augmenting the general revenue of the State. We, therefore, hold that the demand and collection of entry tax under the Kerala Tax on Entry of Goods into Local Areas Act, 1994 is illegal, unauthorized and violative of Article 301 of the

> Constitution of India. Original Petitions are allowed as above and the levy and demand notices issued would stand quashed."

The Court also relied upon judgment of Bombay High Court in ***Eurotax Industries and Exports Limited*** **v.** ***State of Maharashtra*** (2004) 135 STC 25, judgment of the Hon'ble Supreme Court in ***State of H.P.*** **v.** ***Yash Pal Garg*** (2003) 9 SCC 92 and judgment of Jharkhand High Court in W.P. (T) No.5354 of 2004, and also dealt with the judgment of the Hon'ble Supreme Court in ***Vijayalaxmi Rice Mills and others*** v. ***Commercial Tax Officer*** (2006) 6 SCC 763.

20. The Allahabad High Court in its judgment dated 8.1.2007 in **M/s. Indian Oil Corporation Limited v. State of Uttar Pradesh and others,** Civil Misc.Writ Petition No.251 of 2003, considered the question of validity of UP Tax on Entry of Goods Act, 2000, with reference to the contention that the same was violative of Articles 301 and 304 of the Constitution. The State filed an affidavit in the light of order of the Hon'ble Supreme Court in ***Jindal Stainless Limited (3)*** (2006) 7 SCC 271 to show that the tax was compensatory. In the affidavit, the State gave figures of tax received and funds allocated to local bodies and expenditure for development works on construction and

maintenance of roads and bridges. Reliance was also placed on provisions contained in part IX and IX-A of the Constitution substituted by 73rd and 74th amendment read with Eleventh and Twelfth Schedules to the Constitution. Reference was also made to report of the State Finance Commission regarding allocation of funds to local bodies and to report of Eleventh Finance Commission suggesting taxes for augmenting consolidated funds of the States. It was observed by the Court that since the amount of revenue earned from the entry tax was pooled in the consolidated fund and utilized under the budgetary allocation and also utilized to make up budgetary deficit of local bodies, there was no occasion to probe reasonableness or proportionality of the same. It was observed that the State failed to pin-point or establish the specific/additional service/facility provided to payers of the tax.

21. The Patna High Court in its judgment dated 09.01.2007 in ***Harinagar Sugar Mills Limited*** ***v.*** ***The State of Bihar and others,*** Civil Writ Jurisdiction case No.2739 of 2003 also considered the question of validity of levy of Bihar Entry Tax under the 1993 Act, in the light of the directions of the Hon'ble Supreme Court in ***Jindal Stainless Limited (3),*** (2006) 7 SCC 271. The State relied upon amendments made to the Act

providing for creation of Bihar Trade Development Fund. It was held that the Entry Tax could not be treated as compensatory inasmuch as money collected went to the Consolidated Fund. It was, however, observed that after 2006 Amendment, the tax could be held to be compensatory as the proceeds of levy were to be used exclusively for development of trade and industry in the State of Bihar. The conclusions reached were as under:-

> "(i) The levy under the Parent Act of 1993, before its amendments, was not compensatory in character and was, therefore, violative of Article 301 of the Constitution.
>
> (ii) The Parent Act of 1993, before its amendments, was nevertheless saved by virtue of Article 304(b) of the Constitution and the decision in Bihar Chamber of Commerce to that extent remains subsisting till date.
>
> (iii) The amendments introduced in the Act by amending Acts 10 of 2001 and 9 of 2003 were bad because the former made the Act violative of Article 304(a) of the Constitution and further because both the amendments were made without the previous sanction of the President.
>
> (iv) The introduction of imported goods within the definition of 'Entry of Goods' was bad for being

retrospective as also for want of the Presidential sanction/assent.

(v) After the 2006 Amendment the levy under the Act acquired the nature of a compensatory tax and the Act in its present form is a valid piece of legislation.

In light of the above discussions, the two cases are fit to be allowed because they relate to the period 2001-2006. But I would refrain from making any order or direction in that regard since the matter is already pending before the Supreme Court.

The two cases are thus disposed of as directed by the Supreme Court in Jindal Stainless ltd. (3).”

22. The Gauhati High Court in its judgment dated 17.11.2006 ***in ITC Limited v. The State of Assam (WP (C)*** No.2650 of 2005, considered the issue in a batch of nine petitions challenging the validity of Assam Entry Tax Act 2001. It was held that the entry tax was not in the nature of compensatory tax. The same had been levied to broaden the tax base and to obtain additional tax resources. The data produced by the State only showed that certain amounts had been allocated to the local bodies but there was nothing to show that any specific facilities were provided to the traders or importers of the goods. The grants

included grants for expenses incurred in local areas not only for facilities for traders or importers of the goods but also to public at large. Reference may be made to the conclusions reached in para 142, which is as under:-

> "142. From what have been averred in para 9 of the said affidavit, it becomes transparent that the State Government has not been able to give any clear and categorical answer to the queries raised by this Court as to what specific facilities are being provided by the State Government to the traders or importers of goods into the local areas or what facilities are proposed to be provided to the traders, in future, so as to justify the imposition of the *entry tax*. The averments made, in the affidavit, are wholly vague inasmuch as these averments reveal, at best, the total grants, which the State Government has made to the local bodies. These grants would obviously include grants for expenses incurred in the local areas not only for the facilities, which may have been, incidentally, provided to the traders or importers of goods in the State of Assam, but also to the public at large. The State Government merely avers, in its affidavit, that the revenue realized from the *entry tax* is utilized for development of infrastructure to facilitate trade and commerce in the local areas. These averments do not, however, indicate as to what infrastructural developments have been made or are being made to facilitate trade and commerce in the local areas. In fact, the State

Government's affidavit heavily relies on the concept of compensatory tax as had been propounded in **Bhagatram Rajeev Kumar** (supra) and followed and amplified in **Bihar Chamber of Commerce** (supra). In fact, before the decision in **Jindal Stainless Ltd.** (supra) was rendered, the State Government's stand had been that so long as the traders were receiving, along with the public, some facilities and advantages, the realization of *entry tax* from them shall be regarded as compensatory and such a levy is, therefore, sustainable. As against this, **Automobile Transport (Rajasthan) Ltd.** (supra) had made it clear that when the levy is challenged as violative of Article 301, the State must satisfy the Court that for the special benefits which the traders are claimed to have been provided with, the traders are not paying "*patently much more than what is required for providing facilities"*. This test has been adhered even in **Jindal Stainless Ltd.** (supra). In a case of present nature, the State Government ought to have, therefore, shown as to what trading facilities it has really provided to the traders, what expenses are incurred for providing such facilities and how much amount, realized from the imposition of the *entry tax*, is being utilized for providing the trading facilities so that this Court could feel satisfied that the traders are paying, for the facilities, if any, provided to them, *patently not much more than what is required for providing the facilities.* No such thing has been done. Situated thus, it is clear

that the State Government has not discharged its burden of showing that the *entry tax*, in the present case, is compensatory in nature."

23. Jharkhand High Court in its judgment dated 14.08.2006 in ***The Tata Iron & Steel Company Ltd.*** v. ***The State of Haryana*** W.P. (T) No.5354 of 2004 examined the issue with reference to the provisions of Bihar Taxes on Entry of Goods into Local Areas for Consumption, Use or Sale thereof Act, 1993 (Act 16 of 1993) as adopted by the State of Jharkhand vide notification dated 15.12.2000 and as amended vide Jharkhand Tax on Entry of Goods Into Local Areas for Consumption, Use or Sale thereof (Amendment) Ordinance, 2001 and held that the levy therein was not compensatory.

Submissions on behalf of the State:-

24. Learned counsel for the State submitted that the levy of tax was not local area-wise, though taxing event was entry of goods in a local area with reference to Entry-52 in List-II of 7th Schedule of the Constitution. The levy of tax only at one point and provision for deduction of value of goods on which tax had been paid once or on which sales tax had been paid or other statutory exemptions, were meant to lessen the burden of tax and

facilitating the payers of tax. Under Article 243-H and 243-X, State Legislature could authorize the levy of tax by the local bodies and the power of taxation was with the State and not with the local bodies. He submitted that State Finance Commission could be constituted under Article 243-I and 243-Y for distribution of proceeds of tax to local bodies and, therefore, the local area specific collection of tax was not required. He submitted that by providing for utilization of "not less than 60%" of the amount of the tax for developmental facilities, facilitating free flow of trade and commerce of the payers of the tax individually or as a class, facial test laid down in para 46 of the Constitution Bench judgment was met. The benefit specified in the Act was quantifiable and measurable, which was equal to at least 60%, but could be more. The substituted provision of Section 22 with retrospective effect, thus, was a provision for levy of compensatory tax and only question which remained was the review of rate of tax, for which, provision was made in Section 22-A(3)(iv). He pointed out that facility to be provided need not be limited to the payers of the fee, but could be to the ultimate payers. The persons from whom entry tax was collected, could pass on the burden to the general public and thus, spending of money on development of infrastructure facilities like health,

hygiene, sanitation, roads, bridges, electricity, water, waste-management etc. amounted to special services to the payers of the tax. Referring to observations made in para 42 of the Constitution Bench judgment, it was submitted that what was required was "some link" between quantum of tax and the facilities/services. He submitted that providing services to transporter, retailer, consumer of farmer was component of service to trade and commerce. He further submitted that after the amendment, the expenditure to be incurred is on selected items of 11th and 12th Schedule and not on all items. He submitted that having regard to the federal structure of the Constitution, the State could not be expected to seek previous sanction of the President for levying taxes with reference to relevant entries in List-II. It was also submitted that separate fund was not the requirement for meeting the facial test, though a separate fund may be an additional point to show that the tax was compensatory. The taxes collected were subjected to audit and accounting in accordance with the established procedures. It was open to the Legislature to make reasonable classification or to grant exemption.

25. Shri Uday Lalit, Senior Advocate submitted that provision for utilization of at least 60% of the tax collected for development, facilitating free flow of trade and commerce was

consistent with the principles laid down by the Hon'ble Supreme Court in ***Kewal Krishan Puri & others*** ***v.*** ***State of Punjab and others*** 1980 (1) SCC 416 (Para 23), ***Ram Chandra Kailash Kumar and Company and others*** ***v.*** ***State of U.P. and another*** 1980(Supp.) SCC 27, ***Malwa Bus Service (Private) Limited and others*** ***v.*** ***State of Punjab and others*** 1983 3 SCC 237 (Para 20), ***The Delhi Cloth & General Mills Co. Ltd.*** ***v.*** ***The Chief Commissioner, Delhi and others*** 1970(2) SCC 172. He also relied on judgment of the Hon'ble Supreme Court in ***Vijayalashmi Rice Mill and Others*** v. ***Commercial Tax Officer, Palakol and others*** 2006(6) SCC 731, wherein it was observed that the Constitution Bench judgment in **Jindal Stainless Limited (2),** could not be read as having made sea-change in the concept of fee, which had been interpreted by the Hon'ble Supreme Court to mean that specific services to individual payers was not required. Judgments in ***Sreenivasa General Traders*** ***v.*** ***State of A.P*** AIR 1983 SC 1246, ***City Corporation of Calicut*** ***v.*** ***Thachambalath*** AIR 1985 SC 756, ***State of Himachal Pradesh*** ***v.*** ***Shivalik Agro Poly Products*** AIR 2004 SC 4393 were referred to. He also referred to judgment in ***Hardev Motor Transport*** ***v.*** ***State of M.P. and others*** (2006) 8 SCC 613, wherein, after referring to **Vijayalashmi Rice** (*supra)*, it was observed that the

Constitution Bench judgment was binding. He also referred to judgments of the Hon'ble Supreme Court in ***Gasket Radiators Pvt. Ltd. v. Employhees' State Insurance Corporation*** (1985) 2 SCC 68 and ***B.S.E. Brokers' Forum Bombay and others v. Securities and Exchange Board of India*** 2001(3) SCC 482 (Paras 30 and 38). He submitted that since facial test was met, functional test could be relevant only about the rate of tax, for which, the petitioners should be left to avail of separate remedy in the light of observations made in the judgment of the Hon'ble Supreme Court in **Vijayalashmi Rice (***supra).*

Analysis and Finding:

26. From the rival submissions of the learned counsel for the parties and in the light of direction of the Hon'ble Supreme Court, we are required to deal with the issue whether the impugned levy was compensatory in nature having regard to the judgment of the Constitution Bench **Jindal (2)**.

The question is whether the impugned Act meets the facial test laid down by the Hon'ble Supreme Curt in **Jindal (2)** and whether the data placed on record by the State shows that the impugned levy functionally is compensatory and provides quantifiable or measurable benefit to the payers of the tax?

27. A perusal of statutory provisions shows that the levy of tax is on entry of goods into a local area for consumption, use or sale and the tax is payable by the importer with reference to value of goods at a specified rate. The tax collected is to be distributed by the State Government among the local bodies. The same is to be utilized for development facilitating free flow of trade and commerce on infrastructural facilities such as roads, bridges, culverts, sewerage, drainage, sanitation, waste management, electricity, drinking water and other infrastructural facilities. At least 60% of the amount is to be utilized. The Board is to ensure balanced development of the local areas and recommend allotment of proceeds of tax and changes in the rate of tax. The Board is also to ensure that the proceeds of tax are not more than the amount actually required for development of local areas. The petitioners have advanced two grounds for submitting that the impugned levy does not meet the facial test:-

(i) Compulsion to utilize the tax collected is only to the extent of 60% and the amount of 40% need not be accounted for and

(ii) Infrastructural facilities facilitating free flow of trade and commerce may not in fact, have any connection with the facilities for trade and commerce.

Waste management, sanitation, drainage, water, electricity may be unconnected with the facilities for the purpose of trade. The said facilities may be before general development of the State, though termed as facilitating trade and commerce. There is no separate earmarking of the facilities planned for the traders or facilities generally for water supply, hygiene, sanitation, waste management etc.

28. The defence on behalf of the State is that the statutory provisions for constituting a Board and requiring the Board to ensure that the tax collected was not much more than the amount actually required and provision for utilizing at least 60% for development facilitating free flow of trade and commerce of the payers of the tax was not enough to meet the facial test, if the payers of the tax are taken to be the ultimate payers to whom the burden was passed on which include farmers, transporters and consumers.

29. We find merit in the contention raised on behalf of the petitioners. The levy is not to meet the cost of any specific facility already provided or planned to be provided. The parameters clearly laid down in **Jindal (2)** (particularly paras 16 and 41 to 45) are that compensatory tax represent the costs incurred in procuring facilities/services on the principle of “pay for value”. It is a charge for offering trade facilities. It adds to

value of trade and commerce. It is based on the principle of equivalence. It must have a broad proportion to the benefit derived to defray the cost of regulation or to meet the outlay incurred for some special advantage to trade and commerce and intercourse. The impugned levy initially was meant to be for assistance to local areas for their development generally and the amendment brings about only a superficial change in the language while retaining the basic character of the levy as a source for raising general development. In this view of the matter, we are unable to hold that the facial test is met. Mere specification of the 60% of the amount being in line with judgments dealing with the levy of fee is of no consequence when the very subject matter of utilization cannot be treated as any special direct or exclusive service or benefit to the payer of the tax.

30. In view of above, the data given by the State in respect of the amount spent does not stand scrutiny. As rightly pointed out by learned counsel for the petitioners, the expenditure incurred is 17% of the total collection and the expenditure is far less than the collection of much more amount under other statutes levying compensatory taxes to cover the cost of atleast some of the very same services. The burden of proof on the State cannot be held to have been discharged.

31. Though the levy was earlier upheld by this Court with reference to the parameters as understood from the judgments of the Hon'ble Supreme Court, including judgments in **Bharatram and Bihar Chambers of Commerce** (*supra)*, which now stand disapproved by the Constitution Bench, applying the parameters as laid down in **Jindal (2)**, we are of the view that the impugned levy is not compensatory in character. The same amounts to restriction on free flow of trade and commerce and is hit by Article 301 of the Constitution of India.

32. We record our finding accordingly.

(ADARSH KUMAR GOEL)
JUDGE

March 14, 2007 **(H.S. BHALLA)**
gs/ashwani **JUDGE**